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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., AND HUGH T. CORBETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 11 C.F.R. 100.22(b), which defines types of activity that constitute "expressly advocating" a candidate's election, is contrary to the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Election Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 98 F.3d 1. The opinion of the district court (App., *infra*, 3a-18a) is reported at 914 F. Supp. 8.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1996. A petition for rehearing was denied on December 17, 1996. App., *infra*, 44a-45a. On March 3, 1997, Justice Souter extended the time for filing a

petition for a writ of certiorari to and including April 16, 1997. On April 4, 1997, Justice Souter further extended the time for filing a petition for a writ of certiorari to and including May 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The provisions of 2 U.S.C. 431(17), 434(c), 441b, 441d, and 11 C.F.R. 100.22 are set forth in the appendix, App., *infra*, 46a-55a.

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, requires public disclosure of all independent expenditures over $250 that are made in connection with federal elections. 2 U.S.C. 434(c). The Act also generally prohibits corporations and labor unions from using treasury funds to finance contributions and expenditures in connection with federal elections. 2 U.S.C. 441b.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court considered a broad array of issues concerning the construction and constitutionality of the Act. Addressing the disclosure provisions for independent expenditures that preceded those now

codified at 2 U.S.C. 434(c), the Court observed that those provisions could raise vagueness problems "particularly treacherous where * * * [a] violation * * * carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76-77 (footnote omitted). To guard against those dangers, and to ensure that FECA's reporting provisions would regulate "advocacy of a political result" but would not reach "pure[] * * * issue discussion" (*id.* at 79), the Court construed the Act's disclosure requirements "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" (*id.* at 80) (footnote omitted)).

In a footnote to that statement (424 U.S. at 80 n.108), the Court incorporated by reference an earlier passage of its opinion, which had narrowly construed a different section of FECA to reach only "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.[1] That reading of the disclosure provisions, the Court noted, "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

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[1] The earlier passage of the Court's opinion in *Buckley* addressed former 18 U.S.C. 608(e)(1) (repealed 1976), which limited to $1,000 per year the total expenditures that a person could make "relative to a clearly identified candidate." In light of First Amendment concerns, this Court narrowly construed that language to reach only "express advocacy" of a candidate's election. The Court ultimately invalidated Section 608(e)(1) on other grounds. See 424 U.S. at 39-51.

In 1976, in response to *Buckley*, Congress revised the Act to define "independent expenditure[s]" covered by 2 U.S.C. 434(c) as those expenditures that, *inter alia*, are made "by a person expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17); see also 2 U.S.C. 441d (same "express advocacy" test applicable under provision requiring, *inter alia*, disclosure of the identity of those paying for an electoral advertisement or similar communication); see generally H.R. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976). Ten years later, this Court concluded that 2 U.S.C. 441b—which generally prohibits the use of union or corporate treasury funds to finance federal campaign expenditures—also should be limited, when applied to independent expenditures, to spending for communications that "expressly advocate the election or defeat of a clearly identified candidate." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986). In so doing, this Court reaffirmed *Buckley*'s understanding that "the 'express advocacy' requirement [is meant] to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* at 249.

2. The Federal Election Commission is the independent federal agency with jurisdiction over the administration, interpretation, and civil enforcement of the Act. Congress empowered the Commission to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), gave it broad authority to administer the Act, see, *e.g.*, 2 U.S.C. 437g, 438(a) and (b), and authorized it to make "such rules * * * as are necessary to carry out the provisions" of the Act, 2 U.S.C. 437d(a)(8), 438(a)(8).

In October 1995, after a lengthy rulemaking proceeding in which the Commission received thousands of comments (see 60 Fed. Reg. 35,292), the Commission promulgated a regulation designed "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates." *Id.* at 35,293; see *id.* at 52,069. The new regulation, which has been codified at 11 C.F.R. 100.22, provides:

> *Expressly advocating* means any communication that—
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

As the Commission explained (60 Fed. Reg. 35,295 (1995)), subsection (b) of the regulation reflects the analysis of *Buckley*'s "express advocacy" requirement that the Ninth Circuit articulated in *FEC* v. *Furgatch*, 807 F.2d 857, cert. denied, 484 U.S. 850 (1987).

3. In November 1995, respondents Maine Right to Life Committee (MRLC) and Hugh T. Corbett brought this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the United States District Court for the District of Maine. According to the complaint, MRLC "is a statewide, non-profit, membership corporation (with approximately 2000 members) incorporated in the State of Maine" that raises funds for its corporate treasury from for-profit corporations. Complaint ¶¶ 7, 12 (App., *infra*, 20a, 21a). MRLC uses its corporate treasury funds to publish a quarterly newsletter called "Life For ME," which it distributes to members and to the general public. Complaint ¶ 19 (App., *infra*, 22a). In October 1994, MRLC published and distributed to its members and the general public an edition of *Life For ME* containing, *inter alia*, the results of a survey of candidates' positions on pro-life issues. Complaint ¶¶ 35, 36, 40 (App., *infra*, 26a-27a). Respondent Corbett has chosen not to become a member of MRLC, but has obtained MRLC's newsletters and candidate surveys

in the past, and it is alleged that he wishes to receive them in the future. Complaint ¶¶ 8, 51 (App., *infra*, 20a, 30a). Respondents sought a declaration that the definition of "express advocacy" set forth in subsection (b) of the Commission's regulation is "too broad, beyond the authority of the [Commission,] and unconstitutionally vague," App., *infra*, 5a-6a, and an injunction against its enforcement.[2]

The district court recognized that subsection (b) of the Commission's regulation "comes directly from" the Ninth Circuit's reasoning in *FEC* v. *Furgatch*, *supra*. App., *infra*, 11a. The court concluded, however, "that *Furgatch* and the resulting regulation go farther than *Buckley* and *Massachusetts Citizens for Life* permit." *Ibid.*

The district court acknowledged that FECA is "designed to avoid excessive corporate financial interference in elections and [that] the FEC presumably has some expertise" of the type to which federal courts ordinarily "are expected to defer." App., *infra*, 11a-12a. The court also noted that

> [l]anguage * * * is an elusive thing. * * * One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the

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[2] Respondents did not challenge the validity of subsection (a) of the regulation. See App., *infra*, 10a. Respondents did initially challenge additional regulations, 11 C.F.R. 114.4(c)(4) and (5), but they later agreed that their challenge to those regulations was not ripe for review. App., *infra*, 6a n.1. Respondents also sought an injunction against the Attorney General of the United States, but the district court dismissed that request on the ground that no action by the Attorney General against respondents was threatened or contemplated. *Id.* at 16a. Respondents did not appeal that ruling, and it is therefore not at issue in this Court.

> message that a particular candidate is to be elected. Subpart (b) appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous[]" cases where "reasonable minds cannot differ" on the message.

Id. at 12a. The court concluded, however, that the reasonableness and narrow focus of the Commission's regulation are "trump[ed]" (*ibid.*) by this Court's decisions in *Buckley* and *Massachusetts Citizens for Life*, which the court read as "draw[ing] a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues" (*id.* at 13a).

"The advantage of this rigid approach," the district court reasoned, "is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited." App., *infra*, 14a. By contrast, the court believed, the Commission's approach will "chill" a speaker's expression of his or her message, because it will force the speaker to "continually re-evaluate his or her words as the election approaches." *Id.* at 15a. The court accordingly concluded that subsection (b) of the Commission's regulation "is contrary to the statute" as this Court has interpreted it "and thus [is] beyond the power of the" Commission. *Id.* at 16a.

4. The court of appeals summarily affirmed "for substantially the reasons set forth in the district court opinion." App., *infra*, 2a. The court thereafter denied the Commission's petition for rehearing and the Commission's suggestion of rehearing en banc. *Id.* at 44a-45a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case conflicts with the decision of another court of appeals, misapplies this Court's decisions, and threatens significantly to impair the effectiveness of the Nation's election laws. The "express advocacy" standard is a critical element in determining the scope and enforceability of FECA's central anti-corruption measures, since that standard determines the efficacy of the Act's prohibition on corporate and union independent expenditures, see 2 U.S.C. 441b, the requirement of public disclosure of all independent expenditures, see 2 U.S.C. 434(c), and the requirement that political communications identify the person or group that financed them, see 2 U.S.C. 441d. If, as permitted by the decision below, speakers can avoid express advocacy by eschewing a short list of "magic words," then key provisions of the Act will be reduced to a futile vocabulary test. This Court's decisions, which have repeatedly acknowledged the compelling interests that support those key provisions, do not require that result. Accordingly, this Court's review is warranted.

1. The decision of the court of appeals conflicts with *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987). One week before the 1980 general presidential election, Furgatch placed a full page advertisement in the *New York Times*. Captioned "Don't let him do it," the advertisement accused President Carter of "degrading the electoral process and lessening the prestige of the office" in a variety of ways. *Id.* at 858. It then warned: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he

leaves a legacy of low-level campaigning. DON'T LET HIM DO IT." *Ibid.* Furgatch placed the same ad in the *Boston Globe* three days before the general election. Unlike the first ad, the second ad omitted a disclaimer that it was "not authorized by any candidate." *Id.* at 858-859. The Commission brought suit alleging that Furgatch had violated 2 U.S.C. 434(c), by failing to report his expenditures for the two ads, and 2 U.S.C. 441d, by failing to include the disclaimer in the second ad. The district court dismissed the Commission's suit on the ground that Furgatch's ads "did not 'expressly advocate' the defeat of Jimmy Carter." 807 F.2d at 859.

The Ninth Circuit reversed. In the court's view, the "express advocacy" standard of *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and 2 U.S.C. 431(17) "does not draw a bright and unambiguous line" (807 F.2d at 861), but must be interpreted instead in light of the important policies of the Act and the First Amendment interests at stake (*id.* at 862). The court believed "that 'express advocacy' is not strictly limited to communications using certain key phrases," since "[t]he short list of words included in * * * *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate," and a test requiring "magic words * * * or their nearly perfect synonyms * * * would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act." *Id.* at 862-863. Accordingly, the court concluded that "speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable

interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864.

The Ninth Circuit observed that its view of "'express advocacy' * * * will preserve the efficacy of the Act without treading upon the freedom of political expression," 807 F.2d at 864, and it emphasized (*ibid.*) that its standard incorporates "three main components":

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

The court also "emphasize[d] that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's * * * requirements." *Ibid.* Applying that standard, the court concluded that "[r]easonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter" (*id.* at 865), and it accordingly held that "Furgatch was obligated to file the statement and make the disclosures required for

any 'independent expenditure' under the Federal Election Campaign Act" (*ibid.*).[3]

2. The court below was wrong to conclude that this Court's cases preclude a finding that a communication "expressly advocates" a candidate's election or defeat unless that communication includes a concise and explicit electoral directive that uses one of the words that this Court invoked as examples in *Buckley*—words such as "vote for," "cast your ballot for," or "reject" or their near perfect synonyms. *Buckley*, 424 U.S. at 44 n.52; see *id.* at 80 n.108. This Court has repeatedly recognized the "compelling" nature of the government's interests in the public disclosure of independent campaign expenditures, *id.* at 66-68, 80-82, and in preventing corruption, and the appearance of corruption, that could result from "the influence of political war chests funneled through the corporate form." *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 659 (1990); see also *McIntyre* v. *Ohio Elections Comm'n*, 115 S. Ct. 1511, 1523 (1995); *FEC* v. *National Right To Work Comm.*, 459 U.S. 197, 207-208 (1982). *Buckley*'s "express advocacy" test was meant to further those compelling

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[3] The decision below accords with a recent unpublished decision of the Fourth Circuit, see *FEC* v. *Christian Action Network, Inc.*, No. 95-2600, 1996 WL 431996 (Aug. 2, 1996) (92 F.3d 1178 (Table)), aff'g 894 F. Supp. 946 (W.D. Va. 1995). Because the Fourth Circuit's opinion was not published, the Commission did not seek further review of that decision in this Court. Recently, however, in ruling on attorneys' fees issues stemming from that case, the Fourth Circuit has made it clear, in a published opinion, that it agrees with the First Circuit's decision in this case. See *FEC* v. *Christian Action Network, Inc.*, No. 95-2600, 1997 WL 157269, at *6-*7 (Apr. 7, 1997), slip op. 11-12.

interests of the Act, while safeguarding the First Amendment rights of those "engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. It did not purport to trivialize those interests by reducing to Act to a mere form of words.

Buckley's "express advocacy" formulation is better read to connote an electoral message that is clear and unambiguous, since courts ordinarily understand the word "express" to mean "[c]lear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous." *Black's Law Dictionary* 580 (6th ed. 1990); see also *The Random House Dictionary of the English Language (Unabridged)* 683 (2d ed. 1987) (def. 9: "clearly indicated" or "definite"). Indeed, that focus on the lack of any ambiguity in the message, rather than the use of particular words, was suggested by *Buckley* itself, since the Court explained that its reading of FECA was "directed precisely to that spending that is *unambiguously* related to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added).

The approach taken by the courts below is not supported, much less compelled, by *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the only case in which this Court has applied the "express advocacy" test to concrete facts after it addressed the facial validity of FECA in *Buckley*. *Massachusetts Citizens for Life* involved a special edition of a pro-life newsletter that urged readers to "vote pro-life," identified each candidate who had stood for election in the State, and indicated the candidates' views on pro-life issues, together with a disclaimer that no "endorsement of any particular candidate" was intended. *Id.* at 243. This Court rejected the claim

that the newsletter did not constitute "express advocacy," explaining:

> The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect* an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change *its essential nature.* The Edition goes beyond issue discussion to express electoral advocacy. *The disclaimer * * * cannot negate this fact.*

Id. at 249 (emphasis added). Thus, *Massachusetts Citizens for Life*, like the Commission's regulation, focused on the "essential nature" of the message that is conveyed, and it made clear that such a message can be inferred even in the teeth of an explicit disclaimer. *Massachusetts Citizens for Life* therefore refutes the wooden literalism that the court below ascribed to *Buckley*'s "express advocacy" test.

Indeed, that sort of literalism has not traditionally characterized this Court's treatment of cases in which it is necessary to draw lines between regulable conduct and conduct that the First Amendment shields from regulation. In areas as diverse as obscenity, see, *e.g.*, *Miller* v. *California*, 413 U.S. 15 (1973), fighting words, compare *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), with *Cohen* v. *California*, 403 U.S. 15 (1971), libel, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and religious expression, see *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989), this Court has eschewed mechanical tests and has instead evaluated the interests at stake with

sensitivity toward the context and the nature of the expression at issue. See also *Denver Area Educ. Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374, 2385 (1996) (plurality opinion) ("[T]he First Amendment embodies an overarching commitment to protect speech from Government regulation * * *, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems."). Neither respondents nor the courts below have given a sound reason for believing that election regulations alone, among all activities affected by First Amendment concerns, should be governed by a mechanical, formalistic test.

3. The question presented by this case is important. As we have noted, the "express advocacy" test fashioned by this Court in *Buckley* controls the operation of central aspects of FECA. If left unreviewed, the decision below would open the door for corporations, unions, and others in the First Circuit to influence federal elections by spending large amounts of money in independent advertisements that unambiguously attack clearly identified candidates, while carefully avoiding the terms listed as examples in *Buckley*. The decision below would also permit independent spending of that type to remain undisclosed, since "express advocacy" is a key ingredient of the Act's disclosure provisions. Especially in light of the division of authority among the courts of appeals, the decision below warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1532

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.,
PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.,
DEFENDANT-APPELLANT

[Heard Oct. 8, 1996]
[Decided Oct. 18, 1996]

Before: TORRUELLA, Chief Judge, CYR and BOUDIN, Circuit Judges.

PER CURIAM.

Defendant-appellant, the Federal Election Commission ("FEC"), appeals the decision of the district court that "11 C.F.R. § 100.22(b) is contrary to the [Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-55,] as the Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC." *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F.Supp. 8, 13 (D.Me.1996). Appellant argues that the "express advocacy" regulation promulgated in

§ 100.22(b) is facially reasonable, advances compelling governmental interests, and is entitled to deference.

After a careful evaluation of the parties' briefs and the record on appeal, we affirm for substantially the reasons set forth in the district court opinion. *See Maine Right to Life Committee*, 914 F.Supp. 8; *see also Federal Election Commission v. Christian Action Network*, 894 F.Supp. 946 (W.D.Va.1995), *aff'd per curiam*, 92 F.3d 1178 (table), No. 95-2600, (4th Cir. Aug. 2, 1996) (unpublished disposition) (granting defendants' motion to dismiss on the grounds that the complained-of actions did not constitute violations of FECA, and the FEC lacked jurisdiction to bring suit).

Costs to appellee.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Civil No. 95-261-B-H

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.,
PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL.,
DEFENDANTS

[Feb. 13, 1996]

ORDER DENYING MOTION FOR RECONSIDERATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HORNBY, District Judge.

I held a hearing on this matter on February 7, 1996. With the parties' consent, I consolidated the plaintiffs' request for temporary restraining order, the motion for preliminary injunction and the request for final declaratory and injunctive relief. *See* Fed.R.Civ.P. 65(a)(2). There are no disputed facts.

This document contains my findings of facts and conclusions of law. *See* Fed.R.Civ.P. 52.

The Federal Election Campaign Act of 1971 prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative . . . are to be voted for, or in connection with any primary election . . . held to select candidates for any of the foregoing offices. . . ." 2 U.S.C. § 441b(a). On its face, this provision amounts to a very broad prohibition against an organization like the plaintiff Maine Right to Life Committee, Inc. ("MRLC") using corporate contributions in connection with an election. The United States Supreme Court, however, has explicitly limited the scope of this statutory prohibition—on First Amendment grounds—to "express advocacy" of the election or defeat of a clearly identified candidate or candidates. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). *See Faucher v. FEC*, 743 F.Supp. 64, 68 (D.Me.1990), *aff'd*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991). The issue in this case is whether the Federal Election Commission ("FEC") acted beyond its power in the definition it has provided for "express advocacy" as to which corporate financial support is prohibited. *See* 11 C.F.R. § 100.22. I conclude that part of the FEC's definition of "express advocacy" is beyond the FEC's power as limited by these cases.

BACKGROUND

In *Faucher v. FEC*, I set forth the basis for my authority to review a challenge to the legality of FEC regulations under the Administrative Procedure Act. 743 F.Supp. at 67-68. There is no reason to repeat it here.

The material facts about the MRLC have not changed appreciably since my decision in *Faucher*. MRLC, one of the two plaintiffs, is a nonprofit membership corporation exempt from federal income tax under Internal Revenue Code § 501(c)(4). It has approximately 2,000 members. MRLC is not affiliated with any political party, candidate or campaign committee. It is an ideological organization whose purpose is to promote the sanctity of human life, born and unborn; educate the public on abortion; and restore protection of the right to life for unborn children. MRLC accepts contributions from business corporations into its general treasury. MRLC publishes a quarterly newsletter with funds from its general treasury; it surveys candidates before elections to determine their stance on prolife issues and publishes the results in these newsletters; and it makes statements in the news media through such devices as press conferences, guest columns and letters to the editor on a recurring basis.

The second plaintiff is an individual, Hugh T. Corbett, who is not a member of MRLC. He reads its publications, however, and would like to continue to do so.

The plaintiffs seek a declaratory judgment that the FEC's definition of "express advocacy" as to which corporate financial support is prohibited under the Federal Election Campaign Act of 1971 is too broad,

beyond the authority of the FEC and unconstitutionally vague; and an injunction against the FEC and the United States Attorney General to prevent enforcement of this provision.[1]

ANALYSIS

In the context of corporate contributions or expenditures, the FEC historically was unwilling to limit its enforcement activities to express advocacy of the election or defeat of a particular candidate or candidates. Even after *Massachusetts Citizens for Life* held that such express advocacy was the limit on prohibited activity, the FEC refused to revise its regulations to fit this standard until this court explicitly held them to be illegal, the First Circuit affirmed, and the U.S. Supreme Court denied certiorari. The FEC then promulgated draft rules on the subject in 1992, 57 Fed.Reg. 33548, but new language defining express advocacy did not become effective until October 5, 1995, 60 Fed.Reg. 52069, adding a new section 100.22 to Title 11 of the Code of Federal Regulations. This lawsuit is its first judicial review.

The FEC argues that I should not address the merits of the new express advocacy regulation because the MRLC has failed to seek an advisory opinion from the FEC on any communication it proposes to make under the new regulation, and that I should permit the FEC to work out the proper scope of the new regulation on a case-by-case basis. I conclude that

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[1] In their Amended Complaint, the plaintiffs also attacked 11 C.F.R. § 114.4(c)(4), (5), promulgated in December of 1995, but at the hearing, the plaintiffs agreed that these proposed regulations are not yet ripe for review.

this is not an adequate ground for avoiding decision for the following reasons.

The statute does not expressly require that an interested party make use of the advisory opinion. Instead, by its language the advisory opinion is an optional or permissive device. 2 U.S.C. § 437f(a)(2). The U.S. Supreme Court held in *McCarthy v. Madigan* that without an express requirement of exhaustion by Congress, it is within the court's sound discretion whether to require prior resort to administrative remedies. 503 U.S. 140, 144, 112 S.Ct. 1081, 1086, 117 L.Ed.2d 291 (1992). It is true that in *Faucher v. FEC*, 708 F.Supp. 9 (D.Me.1989), Judge Cyr required the MRLC to seek an advisory opinion, but in that case there was a particular newsletter in question that could be submitted to the FEC and there was a substantial period of time until publication of the next issue. Here, the MRLC is seeking a ruling on its expressive activities generally, speech that may occur at any time in the form of interviews with reporters, letters to the editor, guest columns, etc. More important, the MRLC maintains that the FEC regulation is unconstitutional on its face. This is an attack that the FEC cannot dispose of in the advisory opinion process. (The FEC will rule only on whether a particular utterance complies with the statute or its regulations, 2 U.S.C. § 437f(a)(1), whereas the whole point of the plaintiffs' attack is that the very existence of the rule chills speech.) The plaintiff Corbett, moreover, as a listener or reader does not have the advisory opinion route open to him. Finally, time does not permit an advisory opinion in sufficient time before the presidential primary election occurs on March 5, 1996. For these reasons, I

conclude that the plaintiffs are not required to seek an advisory ruling before I rule.

I turn, therefore, to the merits of the lawsuit. Is the FEC's regulation defining prohibited "express advocacy" constitutional? First, I quote the language of the FEC regulation under attack:

> Expressly advocating means any communication that—
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

The measuring standard, as I held in *Faucher*, is set by *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616. There the Court held that it would limit the reach of the federal election statute—in order to preserve its constitutionality as it concerns corporate contributions or expenditures—to a prohibition of express advocacy. *Id.* at 249, 107 S.Ct. at 623. *Massachusetts Citizens for Life* adopted *Buckley*'s definition of "express advocacy,"[2] namely, "com-

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[2] I reject the FEC's position (advanced at oral argument and in Advisory Opinion 1992-23, 1992 WL 215532 (F.E.C.)) that *Massachusetts Citizens for Life* loosened the *Buckley* requirement. The FEC attaches great significance to the fact that *Massachusetts Citizens for Life* allowed a prohibition of language that was "marginally less direct" than the words listed in *Buckley*. *Id.* The actual facts in *Massachusetts Citizens for Life* were that the publication "urge[d] voters to vote for 'pro-life' candidates," identified pro-life candidates and provided their photographs. That, the Court held, was "an explicit directive: vote for the (named) candidates." 479 U.S. at 249, 107 S.Ct. at 623. It was "marginally less direct" only in the sense that it did not say "Vote for Smith," but said "vote pro-life" and then listed the pro-life candidates. *Id.* It is unsurprising that *Massachusetts Citizens for Life* concluded that those words fit the *Buckley* language like a glove. *Massachusetts Citizens for Life* provides no support for the FEC's

munications that include explicit words of advocacy of election or defeat of a candidate," "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 43-44, 96 S.Ct. at 646. According to *Buckley*, "[t]his construction would restrict the [statutory prohibition] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n. 52, 96 S.Ct. at 64., n. 52. Subpart (a) of the new regulation closely tracks this language of *Buckley* and is therefore acceptable to the plaintiffs. They seek to invalidate subpart (b).

Subpart (b) originated as follows. After *Buckley* and before the FEC had adopted its current definition of express advocacy, it brought an enforcement action in connection with the 1980 election. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987) (The context was different in this respect: the corporate prohibition was not involved; instead, the asserted violation was an individual's failure to report to the FEC as required by another part of the statute. But the "express advocacy" standard was still at issue.). The political advocacy in question used none of *Buckley*'s prohibited words, but it was directed against President Carter and used the slogan "Don't let him do it." Because the timing was on the eve of the election, the FEC construed it as seeking the express defeat of President Carter. *Id.* The Ninth Circuit upheld the FEC's enforcement action. To do so, it enlarged

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argument that the standard has thereby been loosened or "clarified."

("interpret[ed] and refine[d]" or made "more comprehensive," according to the court, *id.* at 861, 862), *Buckley*'s definition of express advocacy to include speech that:

> must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 864. It is obvious that subpart (b) of the FEC regulations comes directly from this appellate language. The plaintiffs complain that *Furgatch* and the resulting regulation go farther than *Buckley* and *Massachusetts Citizens for Life* permit.

If the Supreme Court had not decided *Buckley* and *Massachusetts Citizens for Life* and if the First Circuit had not decided *Faucher*, I might well uphold the FEC's subpart (b) definition of what should be covered. After all, the Federal Election Campaign Act is

designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. Federal courts are expected to defer to an administrative agency like the FEC that Congress has established to deal with a problem that demands expertise. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 44-45, 70 L.Ed.2d 23 (1981). Language, moreover, is an elusive thing. The topic here is communication and it is a commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. (Consider the varying meanings of "hot," depending on whether the subject is the weather, spicy food, the currency of a particular topic, etc.) One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. Subpart (b) appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

But there is another policy at issue here and it is one that I believe the Supreme Court and the First Circuit have used to trump all the arguments

suggested above. Specifically, the Supreme Court has been most concerned not to permit intrusion upon "issue" advocacy—discussion of the issues on the public's mind from time to time or of the candidate's positions on such issues—that the Supreme Court has considered a special concern of the First Amendment. As the Court said in *Massachusetts Citizens for Life*:

> The rationale for [*Buckley*'s] holding was: "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest."
>
> * * * * *
>
> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates [protected under the First Amendment] from more pointed exhortations to vote for particular persons [properly regulated by the FEC].

479 U.S. at 249, 107 S.Ct. at 623. In other words, FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. The Court seems to have been quite serious

in limiting FEC enforcement to *express* advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it. *Faucher*, 928 F.2d 468, confirms this reading. First, the First Circuit announced that the deference rule "no longer applies . . . once the Supreme Court has spoken on the issue. . . . It is not the role of the FEC to second-guess the wisdom of the Supreme Court." 928 F.2d at 471. Second, the First Circuit read *Buckley* as "adopting a bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation." *Id.*

As the plaintiffs persuasively argued at the hearing, *Furgatch*, the source of subpart (b), is precisely the type of communication that *Buckley*, *Massachusetts Citizens for Life* and *Faucher* would permit and subpart (b) would prohibit. "Don't let him do it" can be a call for all sorts of actions—write the President or call the White House to change the policy; urge your Senator or Representative to use his or her influence; call a radio talk show host—all actions that are part of public issue advocacy; or it can be interpreted on the eve of the election as calling for

nothing but the unseating of the President. Directly contrary to the First Circuit in *Faucher* (finding that the Supreme Court had created a "bright-line test," 928 F.2d at 471), the Ninth Circuit reasoned that the Supreme Court did *not* "draw a bright and unambiguous line." 807 F.2d at 861. As a result, *Furgatch* allowed the FEC to prohibit the speech (recognizing it as "a very close call," *id.* at 861); *Buckley*, *Massachusetts Citizens for Life* and *Faucher* call for letting it go forward in order to preserve the discussion of public issues even at the risk that it is used to elect or defeat a candidate.

The Explanation and Justification issued on July 6, 1995, reveals that the FEC does indeed intend subpart (b) to have just such breadth:

> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

60 Fed.Reg. at 35295. In other words, what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches.

That is sufficient evidence of First Amendment "chill" to entitle the plaintiffs to relief. *See, e.g.*, *Buckley*, 424 U.S. at 76-77, 96 S.Ct. at 662 (I have also

examined the various statements the MRLC has made in the past as attached to its Amended Complaint and some of them on election eve might well meet the subpart (b) definition. The MRLC engaged in such speech until the effective date of the new FEC definition, October 5, 1995, and then stopped. That too is sufficient evidence of chill.)

CONCLUSION

For these reasons I conclude that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC. I do not address the plaintiffs' argument that the subpart is also void for vagueness.

For the reasons I listed in *Faucher*, all other injunctive and declaratory relief is DENIED. I GRANT the Attorney General's motion to dismiss. The Attorney General takes action only upon a Federal Election Commission referral. No such action is threatened or even contemplated here.

Accordingly, the plaintiffs' request for declaratory judgment is GRANTED as follows: It is hereby ADJUDGED that the regulation found in 11 C.F.R. § 100.22(b) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, and by the United States Court of Appeals for the First Circuit in *Faucher*, 928 F.2d 468, because it extends beyond express advocacy. The Clerk shall enter judgment accordingly.

SO ORDERED.

ORDER ON FEDERAL ELECTION COMMISSION'S MOTION FOR RECONSIDERATION OR RELIEF UNDER RULES 59(E) AND 60(B)

The motion for reconsideration or relief is DENIED. I inquired specifically of the FEC's lawyer at the hearing what factual issues were in dispute so that I could assess whether consolidation of the hearing with the trial on the merits was appropriate under Fed.R.Civ.P. 65(a)(2). The plaintiffs had moved from the outset for such a consolidation and the FEC had filed no written objection, despite the requirements of Local Rule 19. The FEC's lawyer was unable to point to a single factual issue in dispute and it was therefore apparent that only legal issues remained to be resolved. As a result, there was absolutely no reason to delay matters for a trial on the merits.

The FEC had a full opportunity to argue the legality of its regulation and briefed the issue fully. It is specious to maintain that its legal argument should be materially different when the question is success on the merits rather than likelihood of success on the merits. The FEC has pointed me to no requirement that a certified administrative record of its rulemaking proceeding be available to the court before making a decision. In its briefing, the FEC cited extensive portions of the rulemaking history and my decision referred to this history. It is true that I did not have the thousands of pages that the FEC has now filed, but this was not an adjudicative proceeding where I was reviewing an administrative record. Instead, the issue before me was whether the FEC's rule as promulgated was consistent with the United States Supreme Court decisions in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *FEC v.*

Massachusetts Citizens for Life, Inc., 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and the First Circuit decision in *Faucher v. FEC*, 928 F.2d 468 (1st Cir.1990), *cert. denied*, 502 U.S. 820 (1991). My opinion candidly indicated that I believed the FEC had the better of the argument on its regulation so far as the logic of language is concerned, but that the statements by the U.S. Supreme Court and the First Circuit Court of Appeals in the relevant decisions foreclosed the option the FEC had elected. There is no suggestion in the FEC's motion papers how the rulemaking record would or should alter that conclusion, which derives from the language of the court decisions, not the administrative record.

Finally, even now, the FEC declines to tell the court what new arguments it would make if it were afforded the opportunity to take another bite at the apple. Clearly, it was incumbent on the FEC to show me that granting this motion for reconsideration or relief has some point and is not a futile exercise. The absence of such a showing makes the motion appear to be a procedural ploy that would only engender delay in the inevitable outcome.

For all these reasons, the motion is DENIED.

SO ORDERED.

APPENDIX C (EXHIBITS OMITTED)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Cause No. 95-261-B

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.,
PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL.,
DEFENDANTS

AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (INJUNCTIVE RELIEF SOUGHT)

1. This is a civil action for declaratory and injunctive relief arising under the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* ("FECA" or "the Act") and the First and Fifth Amendments to the United States Constitution.

2. The Plaintiffs complain that the Federal Election Commission's regulation found at 11 C.F.R. § 100.22(b) exceeds the statutory authority of the Federal Election Commission and is unconstitutionally vague in violation of due process.

3. In addition, the Plaintiffs complain that the Commission's regulations at 11 C.F.R. § 114.4(c)(5)(i) and 11 C.F.R. § 114.4(c)(5(ii)(A) through (E) exceed the statutory authority of the Commission and are unconstitutional.

4. Finally, the Plaintiffs complain that the chill on Plaintiff MRLC's speech which results from the Commission's unlawful and constitutional regulations infringes the First Amendment right of Plaintiff Hugh T. Corbett to receive information and ideas.

Jurisdiction

5. This Court has jurisdiction under 28 U.S.C. § 1331, 2 U.S.C. § 437 h(a) and 28 U.S.C. §§ 2201 *et seq.* The authority of this Court to declare actions of the Commission void, *ultra vires*, and/or unconstitutional is granted by 5 U.S.C. § 706.

6. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e)(4). The defendants are officers, employees or agents of the United States and the Plaintiffs reside in this district.

Parties

7. Plaintiff Maine Right to Life Committee ("MRLC") is a statewide, non-profit, membership corporation (with approximately 2000 members) incorporated in the State of Maine with affiliated local chapters throughout the State. MRLC is exempt from Federal Income Tax under 26 U.S.C. § 501(c)(4) and is not associated with any political candidate, campaign committee, or political party.

8. Plaintiff Hugh T. Corbett is an adult citizen of the United States, resident of the State of Maine, and an individual eligible to vote in elections for President of the United States. Plaintiff Hugh T. Corbett is not a member of plaintiff MRLC.

9. Defendant Federal Election Commission is an agency of the United States of America.

10. Janet Reno, the Attorney General of the United States, is charged under the Federal Election

Campaign Act with the enforcement of certain penal provisions of said Act. Additionally, the Attorney General is empowered to receive reports of apparent violations of the Act from the Commission and to take appropriate action. 2 U.S.C. § 437g. She is sued in her official capacity.

Facts

11. The purposes of plaintiff MRLC are to educate the public on issues relating to abortion, to restore protection of the right to life for unborn children and to promote the sanctity of all innocent life. MRLC furthers its purposes through a variety of educational, social action and political activities.

12. In the past, plaintiff MRLC has accepted donations from business corporations and intends to continue to accept such donations in the future.

13. Plaintiff MRLC, its Board of Directors, officers and members engage in various types of communications to the general public which are related to the positions of federal candidates on pro-life issues. Examples of such communications are set forth in the following paragraphs.

14. MRLC answers inquiries from the news media and the general public regarding the positions of elected officials and/or candidates for state and federal office on pro-life issues. *See* Statement by Sandra Faucher in article, "Emery reverses abortion stand, favors pro-choice," in the Bangor Daily News, January 12, 1990, attached hereto as Exhibit A.

15. MRLC issues press releases on votes and/or positions taken by elected officials including, *inter alia*, candidates for federal office. *See* undated press release to WVII TV Newsroom, "Baldacci Ignores Reason and Constituents in Voting to Support

Barbaric Abortion Method," attached hereto as Exhibit B; *see also* press release dated November 3, 1994, "Dutremble Attempts to Run from Extreme Pro-Abortion Position," attached hereto as Exhibit C; *see also* press release dated June 10, 1992, "Pro-Lifers Turn Their Strength to the Ballot Box," attached hereto as Exhibit D.

16. MRLC writes editorials, guest columns and letters to the editor for periodical publications regarding federal candidates' positions on pro-life issues. *See* editorial, "Baldacci's abortion vote doesn't represent 2nd District," by Christopher Coughlan, attached hereto as Exhibit E; *see also* guest column, "Clinton record on abortion speaks louder than his words," by Christopher Coughlan, attached hereto as Exhibit F; *see also* letter to the editor, "Dutremble switches position," by Christopher Coughlan, attached hereto as Exhibit G.

17. MRLC holds press conferences at which it makes statements to the media concerning the positions of candidates for federal office on pro-life issues. *See* "Statement by Sandra Faucher At January 11, 1990 Press Conference On Dave Emery Flip-Flop On Abortion," attached hereto as Exhibit H.

18. MRLC publishes and distributes to the general public fliers concerning the positions of candidates for federal office on pro-life issues. *See* "The Truth About David Emery's Stance On Abortion," attached hereto as Exhibit I.

19. MRLC publishes and distributes the organization's newsletter, *Life For ME*, which contains, *inter alia*, articles on federal candidates' positions on pro-life issues. *See* October, 1994 edition of *Life For Me*, containing article, "Don't Stay Home," at p. 3, attached hereto as Exhibit J; *see also* page 3 of May,

1992 edition of *Life For Me*, containing article, "Purcell's Position on Abortion," attached hereto as Exhibit K.

20. MRLC publishes various materials containing federal candidates' positions on pro-life issues and distributes them to its local chapters for further dissemination to the general public. *See* undated flier, "what did the president do on Friday, January 22?" attached hereto as Exhibit L.

21. MRLC makes public statements and speeches regarding federal candidates' positions on pro-life issues at the January 22 rally held annually in Augusta and at other such events. *See* article, "Augusta anti-abortion rally draws 2,000," published in the January 24, 1993 edition of the Maine Sunday Telegram, attached hereto as Exhibit M.

22. MRLC publishes and distributes to the general public voter guides which set forth the positions of federal candidates on pro-life issues. *See* "1994 MRLC Candidate Survey," attached hereto as Exhibit N.

23. MRLC publishes and distributes to the general public voting records which set forth the positions of federal office holders and candidates on pro-life issues. *See* voting record entitled, "Your Legislators . . . And . . . How They Vote" attached hereto as Exhibit O.

24. MRLC advertises and makes available information concerning federal candidates' positions on pro-life issues in the form of audiotapes and videotapes. *See* flier entitled "Updates and Info" attached hereto as Exhibit P.

25. MRLC distributes literature regarding federal candidates' positions pro-life issues at conven-

tions, agricultural fairs, rallies and other such events.

26. MRLC produces radio commercials advertising the availability of voter guides published by Plaintiff MRLC.

27. MRLC maintains informational booths and distributes literature regarding the positions of federal candidates on pro-life issues at state Democratic and Republican conventions.

28. MRLC makes oral presentations to the general public concerning the positions of federal candidates on pro-life issues.

29. All such communications are paid for with the general treasury funds of MRLC.

30. The foregoing list is representative, but not exhaustive, of the types of communications to the general public in which MRLC engages on a regular basis which discuss federal candidates' positions on pro-life issues. MRLC intends to continue to engage in all such types of communications in the future and to pay for them out of its general treasury funds.

31. On October 5, 1995, the Commission promulgated regulations which purported to define the term "expressly advocating." 11 C.F.R. § 100.22 now defines "[e]xpressly advocating" in pertinent part as

> any communication that . . .
>
> > (b) when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because —

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect of defeat one or more clearly identified candidates(s) or encourages some other kind of action.

32. 11 C.F.R § 100.22(b) is beyond the statutory authority of the Commission under 2 U.S.C. § 441b as limited by the *United States Supreme Court in Federal Election Commission v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986) ("MCFL"). MCFL held that 2 U.S.C. § 441b did not prohibit corporate expenditures except those which constituted "express advocacy" of the election or defeat of a clearly identified federal candidate. In so holding, the Court incorporated the definition of "express advocacy" found in *Buckley v. Valeo*, 424 U.S. 1 (1976) ("Buckley"). In addition, the regulation is unconstitutionally vague in violation of due process.

33. On December 14, 1995, the Commission published in the Federal Register a "final rule" to be codified at 11 C.F.R. § 114.4(c)(4) which purports to prohibit corporations from publishing "voting records" which "expressly advocate the election or defeat of any clearly identified candidate . . . ." 60 Fed. Reg. 64260, 64277 (1995). Because such regulation implicitly incorporates the definition of "expressly advocating" in 11 C.F.R. § 100.22(b), such regulation is beyond the statutory authority of the Commission under 2 U.S.C. § 441b as limited by MCFL and is unconstitutional as a content-based restriction on core political speech which is not narrowly-tailored to

serve an overriding state interest. The effective date of this regulation has not yet been published.

34. Plaintiff MRLC makes communications, as delineated in the preceding paragraphs, which would constitute "express advocacy" under 11 C.F.R. § 100.22(b) but which do not constitute "express advocacy" under MCFL and Buckley.

35. Before federal elections, MRLC conducts surveys of the candidates in order to learn their positions on pro-life issues. The surveys are conducted by contacting the candidates in writing to request their written responses to questions concerning pro-life issues. In addition, follow-up telephone calls may be made in order to obtain or to clarify the candidates' responses to survey questions. In the past, all such contacts with candidates have been limited to ascertaining the candidates' positions on issues. In making contacts with candidates in connection with the preparation of voter guides, MRLC has not acted in cooperation, consultation or coordination with any candidate, campaign committee or political committee, or with any agent of any candidate, campaign committee or political committee. Nor has MRLC discussed with any candidates any matters concerning the candidates' plans projects or the needs of any campaign.

36. In the future Plaintiff MRLC intends to continue to compile and publish voter guides in the same manner as it has in the past, that is, to submit written questions on pro-life issues to candidates in order to obtain their responses to said questions. *See* voter guide entitled "1994 MRLC Candidate Survey," attached hereto as Exhibit N. Such voter guides would contain information concerning federal candidates' positions on pro-life issues and would be substantially

similar to those contained in Exhibit N. These publications would be financed from the MRLC's general treasury.

37. On December 14, 1995, the Commission published in the Federal Register a "final rule" to be codified at 11 C.F.R. § 114.4(c)(5)(i) which purports to prohibit corporations from establishing any "contact" with candidates, candidates' committees or candidates' agents "regarding the preparation, contents and distribution" of voter guides. 60 Fed. Reg. 64260, 64277 (1995). The effective date of this regulation has not yet been published.

38. Such regulation is in excess of the statutory authority of the Commission under 2 U.S.C. § 441b as limited by the Supreme Court in *MCFL*, *supra*, and under *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991) ("*Faucher*") and is unconstitutional as a content-based restriction on core political speech which is not narrowly-tailored to serve an overriding state interest.

39. Under the regulation at 11 C.F.R. § 114.4(c)(5)(i), MRLC would be prohibited from exercising its right to contact federal candidates to determine their positions on pro-life issues in connection with the preparation of its voter guides.

40. In the past, MRLC has prepared and published voter guides which have set forth the positions of federal voter guides which have set forth the positions of federal candidates on a range of pro-life issues and have been distributed to MRLC's members and to the general public. The "1994 MRLC Candidate Survey," attached hereto as Exhibit N, is an example of such a voter guide. MRLC intends to continue to publish voter guides substantially similar in format and content to the "1994 MRLC Candidate Survey."

41. A primary election for presidential candidates is scheduled to be held in the State of Maine on March 5, 1996. MRLC wishes to publish a voter guide in connection with said election which will be substantially similar to the "1994 MRLC Candidate Survey" attached hereto as Exhibit N. In preparation of such voter guide, MRLC intends to contact federal candidates in writing and/or verbally in order to ascertain their positions on pro-life issues.

42. On December 14, 1995 the Commission published in the Federal Register a "final rule" to be codified at 11 C.F.R. § 114.4(c)(5)(ii)(A) through (E). 60 Fed. Reg. 64260, 64277-78 (1995). The effective date of this regulation has not yet been published. Such regulation purports to govern the manner in which corporations must prepare and publish voter guides as well as the contents of such voter guides. Such regulation prohibits corporations from engaging in any communications with candidates except those which are "in writing." Such regulation requires that "[a]ll of the candidates for a particular seat or office shall be provided an equal opportunity to respond . . . ." Such regulation requires that "[n]o candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses." Such regulation prohibits voter guides which contain an "electioneering message." Finally, such regulation mandates that a "voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as to convey an electioneering message."

43. Such regulation is in excess of the statutory authority of the Commission under 2 U.S.C. § 441b as limited by the Supreme Court in *MCFL* and under

Faucher, and is unconstitutional as a content-based restriction on core political speech which is not narrowly-tailored to serve an overriding state interest.

44. As delineated in the preceding paragraphs, Plaintiff MRLC engages in written and verbal communications with federal candidates which constitute protected issue advocacy and publishes voter guides which constitute protected issue advocacy. However, such communications and voter guides would be prohibited under the Commission's new voter guide regulations at 11 C.F.R. § 114.4(c)(5)(ii) and (ii). In particular, MRLC would be prohibited from producing voter guides in accordance with its past practice in connection with the March 5, 1996 presidential primary election in the State of Maine.

45. The Commission's new regulations found at 11 C.F.R. § 114.10(a)-(f) contain an exemption from the prohibition of corporate expenditures in connection with a federal election found in 11 C.F.R. § 114.2(b). However, 11 C.F.R. § 114.10 provides that a corporation which accepts donations form business corporations is not entitled to that exemption. Because MRLC has accepted donations from business corporations in the past and intends to continue to do so, it is not eligible for the exemption contained in 11 C.F.R. § 114.10. Therefore the Commission's regulations at 100.22(b) and 114.4(c)95)(i) and (ii) directly affect MRLC's right to engage in speech as outlined herein.

46. As a result of the regulations in 11 C.F.R. § 100.22(b) and those at 11 C.F.R. § 114.4(c)(5)(i) and (ii), if MRLC were to engage in the types of communications outlined in this Complaint or produce voter guides in accordance with its past practice as outlined in this Complaint, the organization could be subjected

to investigative or enforcement proceedings initiated by the Commission or by the Attorney General of the United States.

47. The Commission has initiated enforcement proceedings against alleged violators of the Act in the past and there is no reason to believe that the Commission would not institute enforcement proceedings against MRLC.

48. Enforcement proceedings against MRLC would have the effect of punishing it for the exercise of its rights, privileges and immunities guaranteed by the Constitution of the United States.

49. Moreover, the threat of enforcement proceedings has a chilling effect on the First Amendment rights of MRLC in that the threat of enforcement proceeding deters it from fully and vigorously exercising its rights.

50. Although MRLC believes that the regulations at issue herein are invalid as in excess of the Commission's statutory authority, and unconstitutional, and therefore, cannot be legally enforced, MRLC is chilled in the exercise of its right to engage in the kinds of communications outlined in this complaint because of the threat and fear that the defendants will attempt to enforce the regulations against the it, thereby subjecting it to the burden and expense of defending itself and the potential risk of severe penalties in the event that the regulations are held to be valid.

51. Plaintiff Hugh T. Corbett has obtained communications from MRLC in the past, including, but not limited to, its newsletter and its voter guides and wishes to receive such communications in the future.

52. Immediate and irreparable injury, loss, and damage will result to the Plaintiffs by reason of the

regulation's chilling effect on Plaintiffs' free speech rights.

First Claim for Relief

53. The Plaintiffs reallege the preceding paragraphs.

54. The United States Supreme Court has held that corporate expenditures are not subject to the prohibition in 2 U.S.C. § 441b unless they constitute "express advocacy." *MCFL, supra.*

55. The Commission's regulation at 11 C.F.R. 100.22(b), however, defines "expressly advocating" in an extremely broad fashion which encompasses expression which falls outside the narrow definition of "express advocacy" in *MCFL.* That case had incorporated Buckley's definition of "express advocacy" which required "explicit words of advocacy of election or defeat of a candidate." 96 S.Ct. at 646.

56. The regulations at 11 C.F.R. § 100.22(b) are, therefore, "in excess of the statutory . . . authority . . . "of the Federal Election Commission and are thus void under 5 U.S.C. § 706.

57. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 100.22(b) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Second Claim for Relief

58. The Plaintiffs reallege the preceding paragraphs.

59. The Supreme Court has held that "[d]ue process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal . . . ." *Buckley, Supra*, 96 S.Ct. at 662.

60. 11 C.F.R. § 100.22(b) provides that a communication may constitute "express advocacy" if "[w]hen taken as a whole and with limited reference to external events, such as the proximity to an election [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates . . . ." 11 C.F.R. § 100.22(b) (emphasis added). However, the regulation fails to define the phrase "when taken as a whole," or "limited reference." Moreover, the regulation fails to define what "external events" may be considered and how "proximate" a communication may be to an election before it is subject to proscription. For the foregoing reasons, 11 C.F.R. § 100.22(b) fails to give adequate notice of what is prohibited.

61. For these reasons, 11 C.F.R. § 100.22(b) contravenes the First Amendment's free speech guarantee and the Fifth Amendment's guarantee of due process of law, and is, therefore, unconstitutional.

62. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 100.22(b) is, on its face, in violation of the First and Fifth Amendments to the Constitution of the United States as being violative of the Plaintiff's right to free speech, and, under 5 U.S.C. § 706, is void.

Third Claim for Relief

63. The Plaintiffs reallege the preceding paragraphs.

64. A regulation which vests unbridled discretion in an administrative agency to determine what expression will be permitted and to punish and prohibit constitutionally protected activities violates the Fifth Amendment's guarantee of due process of law.

65. 11 C.F.R. § 100.22(b) provides that a communication may constitute "express advocacy" if "[w]hen taken as a whole and with limited reference to external events, such as the proximity to an election [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates. . . ." 11 C.F.R. § 100.22(b) (emphasis added).

66. The regulation does not, however, limit the Commission's authority to interpret the phrase "when taken as a whole" in a manner consistent with *Buckley*'s definition of "express advocacy." In addition, the regulation does not define what will amount to "limited reference" to external events. Finally, this provision will allow the Commission to consider any number of "external events" and to establish an arbitrary time-frame during which communications may be found to constitute "express advocacy." For the foregoing reasons, 11 C.F.R. § 100.22(b) will result in arbitrary enforcement.

67. Therefore, the regulation at 11 C.F.R. § 100.22 (b) contravenes the First Amendment's free speech guarantee and the Fifth Amendment's guarantee of due process of law and thus is unconstitutional.

68. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 100.22(b) is, on its face, in violation of the First and Fifth Amendments to the Constitution of the United States as being violative of the Plaintiff's right to free speech, and, under 5 U.S.C. § 706, is void.

Fourth Claim for Relief

69. The Plaintiffs reallege the preceding paragraphs.

70. The United States Supreme Court has held that corporate expenditures are not subject to the prohibition of 2 U.S.C. § 441b unless they constitute "express advocacy" of the election or defeat of a clearly identified candidate for federal office. *MCFL*, *supra*; *see also Faucher*, 928 F.2d at 468 (Commission lacked authority under 2 U.S.C. § 441b(a) to promulgate voter guide regulations which restricted issue advocacy).

71. The Commission has, nevertheless, has published a regulation at 11 C.F.R. § 114.4(c)(5)(i) which purports to prohibit corporations from engaging in any "contact" with candidates in connection with the preparation of voter guides. However, because such contacts necessarily constitute protected issue advocacy rather than "express advocacy," the regulation at 11 C.F.R. § 114.4(c)(5)(i) is beyond the authority of the Commission under *MCFL*.

72. The regulation at 11 C.F.R. § 114.4(c)(5)(i) is, therefore, "in excess of the statutory . . . authority . . . "of the Federal Election Commission and is thus void under 5 U.S.C. § 706.

73. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(i) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Sixth Claim for Relief

79. The Plaintiffs reallege the preceding paragraphs.

80. The United States Supreme Court has held that corporate expenditures are not subject to the prohibition of 2 U.S.C. § 441b unless they constitute "express advocacy" of the election or defeat of a

clearly identified candidate for federal office. *MCFL, supra*; *see also Faucher, supra.*

81. Nevertheless, the regulation at 11 C.F.R. § 114.4(c)(5)(ii) purports to prohibit the preparation and distribution of voter guides unless a series of conditions is satisfied (*i.e.*, that the questions to, and responses from, the candidates be in writing; that all candidates for a particular seat have an equal opportunity to respond; that no candidate may receive greater prominence or substantially more space for answers; that the voter guide not contain an "electioneering message"; that the voter guide not score or rate the candidates' responses in such a way as to convey an "electioneering message"). However, because such conditions are completely unrelated to the question whether the voter guides constitute "express advocacy," the regulation will result in the prohibition of protected "issue advocacy." Therefore, the regulation at 11 C.F.R. § 114.4(c)(5)(ii) is beyond the statutory authority of the Commission inasmuch as it regulates communications which constitute issue advocacy.

82. The regulation at 11 C.F.R. § 114.4(c)(5)(ii) is, therefore, "in excess of the statutory . . . authority . . . "of the Federal Election Commission and is thus void under 5 U.S.C. § 706.

83. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(ii) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Seventh Claim for Relief

84. The Plaintiffs reallege the preceding paragraphs.

85. The United States Supreme Court has held that content-based restrictions on core political speech are unconstitutional unless they are narrowly-tailored to serve an overriding state interest. *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995).

86. The Commission's new regulation at 11 C.F.R. § 114.4(c)(5)(II) purports to prohibit corporations from preparing and distributing voter guides unless certain conditions are satisfied. Such regulation constitutes a content-based restriction of speech because it singles out one particular kind of speech—voter guides published by corporations—for individual treatment. Moreover, the discussions of issues contained in voter guides clearly constitute core political speech. Therefore, because it is not narrowly-tailored to serve an overriding state interest, the regulation is unconstitutional.

87. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(ii) is, on its face, in violation of the First Amendment to the Constitution of the United States as being violative of the Plaintiff's right to free speech, and, under 5 U.S.C. § 706, is void.

Eighth Claim for Relief

88. The Plaintiffs reallege the preceding paragraphs.

89. The Commission's new regulation at 11 C.F.R. § 114.4(c)(5)(i) provides that "no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) . . . ." Such regulation implicitly incorporates the Commission's definition of "expressly advocating" found at 11 C.F.R. § 100.22(b). Since, as explained

above, 11 C.F.R. § 100.22(b) is beyond the statutory authority of the Commission, the regulation at 11 C.F.R. § 114.4(c)95)(i) is also beyond the statutory authority of the Commission and is thus void under 5 U.S.C. § 706.

90. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(4) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Ninth Claim for Relief

91. The Plaintiffs reallege the preceding paragraphs.

92. The Commission's new regulation at 11 C.F.R. § 114.4(c)(5)(i) provides that "no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) . . . ." Such regulation implicitly incorporates the Commission's definition of "expressly advocating" found at 11 C.F.R. § 100.22(b). Since, as explained above, 11 C.F.R. § 100.22(b) is unconstitutionally vague, the regulation at 11 C.F.R. § 114.4(c)(5)(i) is also unconstitutional.

93. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(i) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Tenth Claim for Relief

94. The Plaintiffs reallege the preceding paragraphs.

95. The Commission's new regulation at 11 C.F.R. § 114.4(c)(4) purports to prohibit a corporation from preparing and distributing to the general public voting records "which expressly advocate the election or defeat of any clearly identified candidate . . . ."

Such regulation implicitly incorporates the Commission's definition of "expressly advocating" found at 11 C.F.R. § 100.22(b). Since, as explained above, 11 C.F.R. § 100.22(b) is beyond the statutory authority of the Commission, the regulation at 11 C.F.R. § 114.4(c)(4) is also beyond the statutory authority of the Commission.

96. The regulation at 11 C.F.R. § 114.4(c)(4) is, therefore, "in excess of the statutory . . . authority . . . "of the Federal Election Commission and is thus void under 5 U.S.C. § 706.

97. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(4) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Eleventh Claim for Relief

98. The Plaintiffs reallege the preceding paragraphs.

99. The Commission's new regulation at 11 C.F.R. § 114.4(c)(4) purports to prohibit a corporation from preparing and distributing to the general public voting records "which expressly advocate the election or defeat of any clearly identified candidate . . . ." Such regulation implicitly incorporates the Commission's definition of "expressly advocating" found at 11 C.F.R. § 100.22(b). Since, as explained above, 11 C.F.R. §100.22(b) is unconstitutionally vague, the regulation at 11 C.F.R. § 114.4(c)(4) is also unconstitutional.

100. Therefore, Plaintiff MRLC requests a declaratory judgment that 11 C.F.R. § 114.4(c)(4) is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

Twelfth Claim for Relief

101. The Plaintiffs reallege the preceding paragraphs.

102. According to the Supreme Court, a policy or regulation which discourages the First Amendment expression of the speaker also burdens the public's right to hear and read what would otherwise have been written or said. *U.S. v. National Treasury Employees Union*, 115 S.Ct. 1003 (1995).

103. The revised definition of "express advocacy" encompasses speech which may not be prohibited under 2 U.S.C. § 441b as limited by MCFL, and is unconstitutionally vague, and therefore, chills MRLC in its ability to engage in the many types of political speech outlined in this Amended Complaint. Therefore, 11 C.F.R. § 100.22(b) violates Plaintiff Hugh T. Corbett's First Amendment right to receive the information contained in MRLC's communications.

104. Plaintiffs, therefore, respectfully request a declaratory judgment that 11 C.F.R. § 100.22(b) is unconstitutional, as being violative of Hugh T. Corbett's First Amendment right to receive information, and, under 5 U.S.C. § 706, is void.

Thirteenth Claim for Relief

105. The Plaintiffs reallege the preceding paragraphs.

106. Because the regulations at 11 C.F.R. § 114.4 (c)(4) and 11 C.F.R. § 114.4(c)(5)(i) and (ii) are beyond the statutory authority of the Commission and unconstitutional, they have the effect of chilling MRLC's speech with respect to its intended production and distribution of voting records and voter guides. Such chilling effect, in turn, unconstitutionally infringes Plaintiff Hugh T. Corbett's right to

receive information and ideas embodied in such voting records and voter guides.

107. Plaintiffs, therefore, respectfully request a declaratory judgment that 11 C.F.R. § 114.4(c)(4) and 11 C.F. R. § 114.4(c)(5) are unconstitutional, as being violative of Hugh T. Corbett's First Amendment right to receive information, and, under 5 U.S.C. § 706, are void.

WHEREFORE, Plaintiffs respectfully pray:

1. For a declaratory judgment that 11 C.F.R. § 100.22(b) is "in excess of [the] statutory . . . authority . . ." of the Commission as provided by the Federal Election Campaign Act of 1971, *As amended*, 2 U.S.C. § 431 *et seq.*, in that it regulates speech which does not constitute "express advocacy" under 2 U.S.C. § 441b, as that provision has been construed by the Supreme Court and, under 5 U.S.C. § 706, is void.

2. For a declaratory judgment that 11 C.F.R. § 100.22(b) is unconstitutionally vague in violation of due process of law in that it fails to provide adequate notice of what conduct is prohibited and, under 5 U.S.C. § 706, is void.

3. For a declaratory judgment that 11 C.F.R. § 100.22(b) is unconstitutional in violation of due process of law in that it vests the Federal Election Commission with excessive discretion in enforcement of the Act's civil and criminal sanctions and will result in arbitrary enforcement of such sanctions and, under 5 U.S.C. § 706, is void.

4. For a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(i) is beyond the statutory authority of the Commission and, under 5 U.S.C. § 706, is void.

5. For a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(i) unconstitutional and, under 5 U.S.C. § 706, is void.

6. For a declaratory judgment that 11 C.F.R. § 114.4(c)(5)(ii) is beyond the statutory authority of the Commission and, under 5 U.S.C. § 706, is void.

7. For a declaratory judgment that 11 C.F.C. § 114.4(c)(5)(ii) is unconstitutional and, under 5 U.S.C. § 706, is void.

8. For a declaratory judgment that 11 C.F.R. § 114.4(c)(4) is beyond the statutory authority of the Commission and, under 5 U.S.C. § 706, is void.

9. For a declaratory judgment that 11 C.F.R. § 114.4(c)(4) is unconstitutional and, under 5 U.S.C. § 706, is void.

10. For a declaratory judgment that 11 C.F.R. § 100.22(b) is unconstitutional in violation of the First Amendment in that it infringes Plaintiff Hugh T. Corbett's right to receive information and, under 5 U.S.C. § 706, is void.

11. For a declaratory judgment that 11 C.F.R. § 114.4(c)(4) and 11 C.F.R. § 114.4(c)(5) are unconstitutional in violation of the First Amendment in that they infringe Plaintiff Hugh T. Corbett's right to receive information and, under 5 U.S.C. § 706, are void.

12. That the Court enjoin the Defendants from enforcing 11 C.F.R. § 100.22(b).

13. That the Court enjoin the Defendants from enforcing C.F.R. § 114.4(c)(4).

14. That the Court enjoin the Defendants from enforcing 11 C.F.R. § 114.4(c)(4).

15. That the Plaintiffs have such other and further relief as may be just and proper.

VERIFICATION

I, Chris Coughlan, affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

/s/ CHRIS COUGHLAN
CHRIS COUGHLAN
Executive Director
Maine Right to Life
Committee, Inc.

VERIFICATION

I, Hugh T. Corbett, affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

/s/ HUGH T. CORBETT [1/10/96]
HUGH T. CORBETT

DATED: January 11, 1995

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1532

MAINE RIGHT TO LIFE COMMITTEE, ET AL.,
PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.,
DEFENDANT-APPELLANT

Entered: Dec. 17, 1996

ORDER OF COURT

Before: TORRUELLA,* Chief Judge, SELYA, CYR, BOUDIN, STAHL and LYNCH, Circuit Judges.

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and, the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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* Chief Judge Torruella did not participate in the denial of the petition.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied

By The Court:

WILLIAM H. NG
Clerk

[cc: Messrs. Kolker, Flannery and Bopp]

APPENDIX E

1. The Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, provides in pertinent part:

§ 431. Definitions

When used in this Act:

* * * * *

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

* * * * *

§ 434. Reporting requirements

* * * * *

(c) Statements by other than political committees; filing; contents; indices of expenditures

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of this section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth,

on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

* * * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or

labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership

organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting

contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid

on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

* * * * *

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the

communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

* * * * *

2. Section 100.22 of Title 11, Code of Federal Regulations, provides:

§ 100.22 Expressly advocating (2 U.S.C. 431(17)).

Expressly advocating means any communication that—(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the

election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Supreme Court, U.S.
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No. 96-1818

In The

Supreme Court of the United States

October Term, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., AND HUGH T. CORBETT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE RIGHT TO LIFE COMMITTEE AND HUGH T. CORBETT

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54 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the regulation at 11 C.F.R. § 100.22(b) defining the phrase "express advocacy" is beyond the statutory authority of the Federal Election Commission under 2 U.S.C. § 441b as that provision has been construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) and therefore, void under the Administrative Procedure Act, 5 U.S.C. § 706.

LIST OF PARTIES AND DISCLOSURE STATEMENT

Respondent Maine Right to Life Committee, Inc. (MRLC) is a nonprofit corporation organized under Maine law. MRLC has neither parent companies nor subsidiaries. Hugh T. Corbett is an individual and not a member of MRLC.

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BRIEF IN OPPOSITION FOR RESPONDENTS MAINE RIGHT TO LIFE COMMITTEE AND HUGH T. CORBETT

The Respondents respectfully request that this Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on October 18, 1996.

STATEMENT OF THE CASE

This case concerns the validity of 11 C.F.R. § 100.22(b), a regulation adopted by the Federal Election Commission to define the term "expressly advocating" for the purposes of the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA). The court of appeals held that the regulation exceeds the authority of the Federal Election Commission (FEC) under 2 U.S.C. § 441b as that provision has been construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (*Buckley*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (*MCFL*) and is, therefore, invalid. The FEC filed its Petition for a Writ of Certiorari, which Respondents now oppose.

I. THE FEC'S REGULATION AT 11 C.F.R. § 100.22(b) IS MUCH BROADER THAN PERMITTED UNDER THIS COURT'S SPEECH-PROTECTIVE FIRST AMENDMENT PRECEDENTS.

A. The "express advocacy" test, the narrowing construction placed on 2 U.S.C. § 441b by this Court under *MCFL* and *Buckley*, defines the outer limit of governmental regulation of political speech under the First Amendment.

FECA places various restrictions on disbursements for communications made in connection with federal elections. For example, FECA makes it "unlawful . . . for

any corporation . . . to make a contribution or expenditure in connection with any [federal] election. . . . " 2 U.S.C. § 441b. For the purposes of 2 U.S.C. § 441b, the phrase "contribution or expenditure" is defined to

> include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate . . . in connection with any election to any [federal] office. . . . "

2 U.S.C. § 441b(b)(2). Recognizing that § 441b's prohibition on corporate expenditures has the potential to restrict speech protected by the First Amendment, this Court limited the reach of that provision, "hold[ing] that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. In so holding, this Court incorporated by reference the "express advocacy" test it had previously developed in *Buckley*. Under *Buckley's* test, a communication constitutes express advocacy only if it includes "*explicit words of advocacy* of election or defeat of a candidate. . . . " 424 U.S. at 43 (emphasis added).

B. The FEC's definition of "expressly advocating" is broader than this Court's definition of that term and thus exceeds the authority of the FEC under 2 U.S.C. § 441b.

1. The regulation at 11 C.F.R. § 100.22.

Petitioner FEC promulgated a regulation at 11 C.F.R. § 100.22, which purported to define the term "expressly advocating." The regulation, which became effective on October 5, 1995, defines "[e]xpressly advocating" as

> any communication that –
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support

> the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94" "vote Pro-life" or "vote Pro-choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76" "Reagan/Bush" or "Mondale!"; or
>
> (b) when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. As will be shown, subpart (b) of 11 C.F.R. § 100.22 encompasses speech which this Court has placed beyond the reach of governmental regulation.

2. The instant lawsuit.

Recognizing that subpart (b) of the above-quoted regulation encompassed speech which is protected by the First Amendment under the *Buckley* definition of "express

advocacy," Respondent Maine Right to Life Committee (MRLC) a non-profit corporation domiciled in Maine filed the instant action under the Administrative Procedure Act, specifically, 5 U.S.C. § 706. MRLC's principal claim was that the second portion of the regulation (11 C.F.R. § 100.22(b)) exceeds the authority of the FEC under 2 U.S.C. § 441b (FECA's prohibition of corporate expenditures) as that section had been construed by this Court in *MCFL*. Although the regulation had not been enforced, MRLC feared that the FEC would enforce it. Therefore, MRLC, a corporation which routinely engages in the public discussion of issues, brought this lawsuit against the FEC's regulation rather than censor its own speech. Respondent Hugh T. Corbett joined in the action, contending that the chilling effect of the regulation on MRLC's speech would inhibit the exercise of his First Amendment right to receive information from MRLC. *See Amended Verified Complaint*; Petitioner's Appendices (Pet. App.) at 19.

The district court held that "the regulation found in 11 C.F.R. § 100.22(b) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life. . . . " Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F.Supp. 8, 13 (D.Me. 1996); Pet. App. at 3. The court of appeals "affirm[ed] for substantially the reasons set forth in the district court opinion." 98 F.3d 1 (1st Cir. 1996); Pet. App. at 1.

3. This Court's development of the "express advocacy" test in *Buckley*.

In *Buckley*, this Court recognized that certain provisions of FECA inhibit the exercise of protected political speech. For example, in considering the constitutionality

of the provision then contained in 2 U.S.C. § 434(e) (which required disclosure of campaign-related contributions and expenditures by persons other than political committees), this Court stated that the provision

> raises serious problems of vagueness particularly treacherous where . . . the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

Buckley, 424 U.S. at 76-77. Section 434(e) required

> '[e]very person . . . who makes contributions or expenditures' aggregating over [a certain threshold] in a calendar year . . . to file a statement with the Commission.

Id. at 74-75. As this Court noted,

> '[c]ontributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office.

Id. at 77. This Court explained that "it is the ambiguity of this phrase [for the purpose of . . . influencing] that poses constitutional problems." *Id.* That phrase was constitutionally infirm because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Therefore, in order to "insure that the reach of § 434(e) is not impermissibly broad," this Court narrowly construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

In a footnote to the term "expressly advocate" in the last-quoted passage, this Court referred to an earlier footnote in *Buckley* (424 U.S. at 44 n.52) in which it had defined "express advocacy" for the purpose of narrowly

construing a different provision of FECA. *Id.* at 80 n.108. There this Court explained that the section of FECA which placed a $1,000 annual ceiling on expenditure[s] . . . relative to a clearly identified candidate" must be

> restrict[ed] . . . to communications containing *express words of advocacy* of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'

424 U.S. at 44 n.52 (emphasis added).

The *Buckley* Court referred to this constitutionally-required narrowing construction (which has become known as the "express advocacy test") repeatedly throughout the opinion. In no fewer than eight separate references,[1] this Court made clear that the "express advocacy test" was a "narrow[ ] and explicit[ ] constru[ction]" of FECA, *id.* at 44, which reached only communications which include "explicit words of advocacy" or communications which "in express terms advocate the election or defeat of a clearly identified candidate for federal

---

[1] This Court described the "express advocacy" test in the following words: (1) "explicit words of advocacy," *Buckley*, 424 U.S. at 43; (2) "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; (3) "communications containing express words of advocacy of election or defeat," *id.* n.52; (4) "expenditures that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 45; (5) "express advocacy of election or defeat," *id.*; (6) "funds for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80; (7) "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.*; and (8) "expenditures that expressly advocate a particular election result," *id.*

office."[2] *Id.* at 43-44. This Court further characterized the "express advocacy" test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness. . . . " *Id.* at 45. In this regard, it is noteworthy that the court of appeals in *Buckley* had attempted to deal with the perceived vagueness of 18 U.S.C. 608(e)(1) by reading the phrase " 'relative to' a candidate to be read to mean 'advocating the election or defeat of a candidate.' " 424 U.S. at 42. However, this Court held that "the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether." *Id.* Thus, this Court insisted that mere "advocacy" was not enough to bring a communication within the purview of the statutory limitation; rather, the communication must contain "explicit words of advocacy." *Id.* at 43.

There is a pragmatic reason why the express advocacy test must be narrow and explicit. It is because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. This follows from the fact that

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. The close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed

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[2] "Express" is defined to mean "clear, definite, explicit. . . . " BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Thus, "express" and "explicit" are synonymous.

in a position of doubt, not knowing whether to censor his own speech. As *Buckley* explained,

> [n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). In order to avoid the "constitutional deficiencies" described in the foregoing quotation (*i.e.*, vagueness and overbreadth leading to self-censorship), *Buckley* held that the statutory expenditure limitations must be "limited to communications that include *explicit words of advocacy* of election or defeat of a candidate." 424 U.S. at 43 (emphasis added).

In sum, "[s]o long as persons and groups eschew expenditures that in *express* terms advocate the election of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45. Under the *Buckley* definition of "express advocacy," then, disbursements for political purposes are accorded full First Amendment protection as long as they remain outside the narrowly-circumscribed category of "express advocacy."

4. The policies animating this Court's development of the "express advocacy" test.

This Court developed the "express advocacy" test specifically to implement the central purpose of the First Amendment: the protection of political speech from governmental infringement and concomitant self-censorship. This Court has stated that the purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This principle has particular relevance in the field of election law, because such laws by their very nature seek to limit the amount of money spent in connection with campaigns. *See, e.g.*, 2 U.S.C. § 441b. As this Court has explained,

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley, 424 U.S. at 18-19. Thus, the *sine qua non* of robust political discourse is the ability to spend money for political communications. Therefore, while acknowledging that Congress has the general constitutional power to regulate elections for federal office, *id.* at 13, this Court has recognized that the regulation of the election process is fraught with peril to First Amendment freedom of speech. As this Court stated, "[t]he Act's contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added).

As this Court further explained in *Buckley*, there is no doubt that the framers of the First Amendment specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of

governmental affairs." 424 U.S. at 14, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966). The reason for the protection of political speech was the framers' understanding that it is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. This Court stated that,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. Or, as this Court stated elsewhere in the opinion, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

The protection of political speech is not unique to *Buckley* and its progeny, but has a long provenance in this Court's case law. As this Court stated in *New York Times*, "that freedom of expression on public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269. Indeed, "public discussion" is not only a political right, it "is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931). Thus, this Court has been solicitous to protect political speech not only as a matter of individual liberty, and not only because such was the intention of the First Amendment's framers, but because such speech is crucial to the survival of our representative government and its system of ordered liberty. This principle, in turn, presupposes that First Amendment protection of political speech – necessary for the very survival of self-government – is,

therefore, the precondition of all other freedoms protected by the Constitution.

Adhering to this Court's First Amendment jurisprudence, the *Buckley* Court rooted its First Amendment analysis in the purpose of protecting the institutions of democracy. Therefore, it is evident that this Court in *Buckley* was avid to protect political speech against infringement under FECA. In particular, this Court wished to protect a species of political speech – *issue advocacy* – from regulation. As has been explained above, this Court did so through the development of the "express advocacy" test.

5. *MCFL's* application of the "express advocacy" test to § 441b.

In *MCFL*, this Court unanimously held that 2 U.S.C. § 441b prohibited only those corporate communications which consisted of "express advocacy." *MCFL* concerned, *inter alia*, the question of whether a voter guide published by a nonprofit, ideological corporation constituted "express advocacy." The defendant in *MCFL* had contended that, like the disclosure provisions of 2 U.S.C. § 434(e) at issue in *Buckley*, 2 U.S.C. § 441b (the "more intrusive provision that directly regulates independent spending") demanded a narrowing construction in order to comply with the requirements of the First Amendment. *MCFL*, 479 U.S. at 248-49. This Court agreed, holding "that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 497 U.S. at 249. In so holding, the *MCFL* Court relied on the same fundamental rationale which animated *Buckley*, *i.e.*, that *issue advocacy* must be protected:

> *Buckley* adopted the "express advocacy" requirement to distinguish *discussion of issues* from more pointed exhortations to vote for particular

> persons. We therefore concluded in that case that a finding of "express advocacy" *depended upon the use of language such as "vote for," "elect," "support," etc.*

497 U.S. at 249 (emphasis added). Thus, *MCFL* not only reaffirmed the "explicit words of advocacy" approach which this Court had adopted in *Buckley*, but it did so in order to implement *Buckley's* underlying rationale: to protect *issue* advocacy by drawing a bright and impermeable line around *express* advocacy. Thus, issue advocacy could never be subject to restriction under § 441b as construed by *MCFL*.

C. The FEC has a history of attempting to restrict issue advocacy.

Despite this Court's solicitude for issue advocacy, the FEC has historically attempted to expand the scope of "express advocacy" thereby necessarily impinging on "issue advocacy." Ever since this Court's 1976 decision in *Buckley*, the agency has engaged in an effort aimed at modifying the holding that issue advocacy is constitutionally protected and that only speech which in express terms advocates the election or defeat of a clearly identified candidate may be regulated.[3] This effort has been repeatedly rebuffed by the lower federal judiciary.[4] In its

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[3] For a review of the history in this regard, *see* Fair Government Foundation, The FEC's Express War on Free Speech (1996).

[4] The cases holding that the "express advocacy" standard must be construed narrowly are numerous. *See, e.g., Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995) *aff'd per curiam*, 92 F. 3d 1178 (4th Cir. 1996); *Clifton v. Federal Election*

opinion in the instant case, the district court chronicled a portion of the FEC's effort as follows:

> In the context of corporate contributions or expenditures, the FEC was *unwilling to limit its enforcement activities to express advocacy* of the election or defeat of a particular candidate or candidates. Even after *Massachusetts Citizens for Life* held that such express advocacy was the limit on prohibited activity, the FEC refused to revise its regulations to fit this standard until this court explicitly held them to be illegal, the First Circuit affirmed, and the U.S. Supreme Court denied certiorari.

914 F.Supp. at 9; Pet. App. at 6 (emphasis added). As the Fourth Circuit recently summarized, the decision below

> is only the most recent in a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'express advocacy' and the permissible scope of the FEC's authority over corporate political speech.

Commission, 927 F. Supp. 493 (D.Me. 1996), *holding modified*, No. 96-1812, slip op. (1st Cir. June 6, 1997); *Federal Election Commission v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.), *aff'd in part and rev'd in part on alternate grounds* 65 F.3d 285 (2nd Cir. 1995); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1448 (D.Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996); *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991) *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) and *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979).

Federal Election Commission v. Christian Action Network, 110 F.3d 1049, 1055 (4th Cir. 1997) (*CAN II*).[5]

Throughout those cases, the FEC's position has consistently been that "explicit" or "express" words of advocacy are not required for a communication to constitute "express advocacy."[6] Indeed, in *CAN II*, the FEC "conced[ed] that the advertisement it claimed was "express advocacy" did "not employ 'explicit words,' 'express words,' or 'language' advocating the election or defeat of a particular candidate for public office." 110 F.3d at 1050. Rather, the FEC's position

> was (and is) that the determination of whether a given communication constitutes "express advocacy" depends upon all of the circumstances, internal and external to the communication, that could reasonably be considered to bear upon the recipient's interpretation of the message.

110 F.3d at 1056. Indeed, the FEC's position is embodied in the 11 C.F.R. § 100.22(b). As the *CAN II* court stated, "that portion of the FEC's new regulatory definition of 'express advocacy' " invalidated by the court below is, in substance, "the definition the FEC urged upon us." 110 F.3d at 1055.

The regulation at issue here, then, is essentially no different from the version of "express advocacy" which

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[5] *CAN II* involved the issue of whether the FEC was liable for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) for an unsuccessful enforcement action against the Christian Action Network. The United States Court of Appeals for the Fourth Circuit held that the FEC was liable for attorneys' fees because the FEC's position in the underlying litigation was "foreclosed by clear, well-established Supreme Court caselaw," and therefore, was not "substantially justified" within the meaning of 28 U.S.C. § 2412. 110 F.3d 1049, 1050.

[6] *See, generally,* cases cited above in footnote 4.

the FEC has advocated before the lower federal courts for two decades, and which those courts have repeatedly rejected. As *CAN II* recognized, the fact that this Court has "unambiguously limited the Federal Election Commission's authority over corporate expenditures to those for communications that use explicit words of advocacy has been uniformly recognized by the lower courts."[7] 110 F.3d at 1052.

D. The FEC has fashioned its regulatory definition of "expressly advocating" by eliminating an essential component of this Court's definition and substituting *dicta* from a court of appeals opinion.

It is apparent that subpart (a) of 11 C.F.R. § 100.22 originated in the examples of "express advocacy" contained in *Buckley's* footnote 52. 424 U.S. at 43. It is also apparent that subpart (b) originated in *dicta* contained in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *See MRLC*, 914 F.Supp. at 11; Pet. App. at 10. Indeed, the FEC concedes as much. *See* 60 Fed. Reg. 35,292 (1995).

Furgatch was an FEC enforcement action against an individual who, during the week prior to the 1980 presidential election, had placed a full-page advertisement in the *New York Times* and *The Boston Globe* criticizing President Carter's campaign. *Id.* at 858. Although Furgatch's advertisements exceeded the monetary thresholds which triggered FECA's disclosure provision (2 U.S.C. § 434(c)),

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[7] The FEC's history of attempting to broaden express advocacy presents a sharp contrast with Congress's response to *Buckley*, which was to comply with this Court's constitutional holding by adding the definition of "independent expenditures" to FECA and incorporating the term "expressly advocating" therein. *See* 2 U.S.C. § 431(17).

neither advertisement was reported to the FEC. *Id.* Moreover, the *Globe* advertisement omitted the disclaimer required by 2 U.S.C. § 441d. In part the advertisement read:

> The President of the United States continues degrading the electoral process and lessening the prestige of the office.
>
> * * *
>
> It is an attempt to hide his own record or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.
>
> DON'T LET HIM DO IT.

807 F.2d at 858. The FEC sued Furgatch under 2 U.S.C. §§ 434(c) and 441d. The district court dismissed and the FEC appealed to the Ninth Circuit. The issue before that court was whether Furgatch's advertisement constituted "express advocacy." The court held that it did and handed down a lengthy opinion explaining its holding. The opinion explained the court's view that in order to be considered express advocacy, speech must "when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 864.

As the district court noted, *dicta* (such as the foregoing) extracted from *Furgatch* is the source for much of 11 C.F.R. § 100.22(b), the regulation at issue in this case. *See MRLC*, 914 F.Supp. at 11; Pet. App. at 10. As the *CAN II* court recognized, the "soft" or "broad[ ]" explanatory "observations were obviously *dicta*." 110 F.3d 1055 n.6. Because many of these *dicta* appeared to support the broad interpretation of "express advocacy" advocated by the FEC, the agency wished to preserve them for subsequent use. Therefore, the government vigorously

opposed Furgatch's petition for a writ of certiorari. In marked contrast to its position here, the FEC in *Furgatch* argued that a grant of certiorari was not proper, since the broad *Furgatch* language was not part of the holding. As the FEC recognized in 1987 (a position the FEC repudiates here), *Furgatch* was a mere application of the legal standard of "express advocacy" to a set of facts:

> The court of appeals' assessment of Mr. Furgatch's advertisement under that standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court. . . .

Furgatch, Brief for Respondent in Opposition at 7; Respondents' Appendix (Resp. App.) at 7. In arguing that *Furgatch* was limited to its facts, the FEC echoed the Ninth Circuit's statement about "express advocacy" determinations in general:

> Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions.

807 F.2d at 861. Thus, as the FEC was aware and as it argued in its Brief in Opposition to the Petition for Writ of Certiorari, the holding of the *Furgatch* court was based on the words in the communication itself, not on the *dicta* justifying the decision,[8] and thus, would carry little precedential weight.

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[8] As the *CAN II* court stated regarding the narrowness of the holding in *Furgatch*, the Ninth Circuit's "almost *exclusive* focus on 'speech' defined as the *literal words* or test of the communication, could not have been any clearer. . . . " 110 F.3d at 1053 (emphasis added).

1. The structure of the FEC's regulation.

The regulatory definition of "expressly advocating" in 11 C.F.R. § 100.22 is the product of a deliberate manipulation of judicial precedent by the FEC. The regulation was formed by splitting this Court's definition of "express advocacy" into two portions, then omitting one of those portions altogether and replacing it with *dicta* extracted from *Furgatch*.

The first half of the *Buckley* definition could be called, for convenience, the "definition proper." It is a dictionary-type definition. Under it, "express advocacy" means "explicit words of advocacy of election or defeat of a clearly identified candidate." 424 U.S. at 43. The second part of the definition could be called its "exemplary section," because in it this Court gave examples of "explicit words" which illustrated its definition.[9]

In fashioning its regulation defining "expressly advocating," however, the FEC has entirely omitted the "definition proper" and, instead, used examples of "explicit words" in subsection (a) of its definition. In subpart (b), it uses the amorphous standard patterned after *dicta* extracted from *Furgatch*, which rejects the "explicit words of advocacy" required by *Buckley* and *MCFL*.

REASONS FOR DENYING THE PETITION

For the reasons set forth below, this Court should deny the petition. This case is not of sufficient importance

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[9] This list of examples was contained in *Buckley's* footnote 52. 424 U.S. at 44 n.52. It is important to note that footnote 52 contained the *complete* definition of "express advocacy," both the "definition proper" ("express words of advocacy of election or defeat") and the "exemplary section" ('vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.').

to warrant this Court's attention; the decision below correctly applied this Court's precedents; and the decision below does not create a conflict among the courts of appeals.

I. THE DECISION BELOW WILL NOT IMPAIR THE EFFECTIVENESS OF THE NATION'S ELECTION LAWS.

The FEC argued that the "question presented by this case is important," because "the 'express advocacy' test fashioned by this Court in *Buckley* controls the operation of central aspects of FECA." Petition for a Writ of Certiorari (Pet.) at 15. The importance of the "express advocacy" test, however, must not be confused with the putative importance of granting review of the court of appeals' decision. For, contrary to the FEC's tacit assumption, the continued viability of the "express advocacy" test does not depend upon the continued viability of the FEC's regulation. The FEC states that "key provisions of the Act will be reduced to a futile vocabulary test" if "*as permitted by the decision below*, speakers can avoid express advocacy by eschewing a short list of 'magic words'. . . . " Pet. at 9 (emphasis added). But how can this be so?

The only issue before the court below was the validity of the definition of "expressly advocating" in a portion of an FEC regulation under the rule of *Buckley*. The court of appeals simply compared the regulation with the "express advocacy" standard in *Buckley*. In doing so, it found the regulation wanting. But the "express advocacy" test, as set forth by this Court in *Buckley* and re-affirmed in *MCFL*, is completely unaffected by the lower court's holding; it continues to be the law. Letting the decision below stand will impair only the use of the FEC's regulation – which is contrary to this

Court's "express advocacy" test – not the "express advocacy" test itself.

How, indeed, could a return to the regime of *Buckley's* express advocacy test "impair the effectiveness of the Nation's election laws"? Pet. at 9. How does the decision below 'permit' speakers to "avoid express advocacy by eschewing a short list of 'magic words' "? *Id.* Only if *Buckley's* test *itself* is a "magic words" test and, therefore, illegitimate. By equating the regulation (which contains only the FEC's *version* of the "express advocacy" test) with this Court's "express advocacy" test *itself*, the government makes *sub silentio* the specious claim that impairing the validity of the *regulation* will impair the validity of the nation's election laws. But the invalidation of a mere regulation cannot have such a sweeping effect. The only effect it could have is to return the election laws to the situation which existed before the regulation was promulgated. At that time, *Buckley's* "express advocacy" test was clearly the law and *MCFL* had applied the test to 2 U.S.C. § 441b. Corporations were free to make expenditures in connection with federal elections as long as they refrained from "express advocacy" as the *Buckley* Court had defined it. A return to that state of things can by no means be considered an "impairment" of the nation's election laws *unless Buckley itself is infirm.*

Thus, the FEC has attempted to transform the narrow issue of the validity of its regulation into a fundamental issue of constitutional law. As the FEC frames it, the issue, in actuality, is whether *Buckley's* rule itself is valid. Indeed, the FEC implies that *Buckley's* test is a mere 'magic words' test. *See* Pet. at 15. The FEC does not simply want this Court to review the validity of the FEC's regulation, it wants this Court to re-visit *Buckley's* express advocacy test and to re-cast it in the much broader mold which the FEC advocates.

In short, *Buckley's* "express advocacy" test was the law before this regulation was promulgated and will remain the law, whether or not this Court grants the instant petition. The court of appeals had neither the power nor the occasion to call into question the validity of *Buckley's* test. Nor does the FEC by regulation.

Because the instant case concerned the validity of a regulation rather than a statute, it does not foreclose the FEC from attempting to bring enforcement actions based on the various applicable provisions of FECA. The decision below did not limit the FEC's statutory enforcement powers. 2 U.S.C. §§ 437d, 437g. Therefore, despite the First Circuit's holding, the FEC remains free to attempt to enforce all provisions of FECA which have as a constituent element the "express advocacy" test. The FEC is only foreclosed from bringing enforcement actions based on that portion of the "express advocacy" definition contained in 11 C.F.R. § 100.22(b), which is contrary to this Court's construction of § 441b, the statutory authority for the FEC's regulation. This is hardly an impairment of the enforcement of the nation's election laws.

II. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S DECISIONS.

A. The court below correctly relied upon the actual language of *Buckley's* "express advocacy" test.

The fundamental issue before the court below was whether 11 C.F.R. § 100.22(b) conformed to the narrow, speech-protective "express advocacy" test set forth in *Buckley* and *MCFL*, or whether it would prohibit more speech than *Buckley* allows. In arriving at the conclusion that the regulation was invalid for overbreadth, the court of appeals substantially adopted the opinion of the district court. As the district court's opinion discloses, that

court adhered strictly to the "express advocacy" test in *Buckley*.

The district court's point of departure was that the "measuring standard" for its decision "is set by *Massachusetts Citizens for Life*." 914 F.Supp. at 10; Pet. App. at 9. In that case, "[this] Court held that it would limit the reach of the federal election statute . . . to a prohibition of express advocacy." *Id.* Pet. App. at 9. *MCFL*, the court continued,

> adopted *Buckley's* definition of "express advocacy," namely, "communications that include *explicit words of advocacy* of election or defeat of a candidate," "communications that *in express terms advocate* the election or defeat of a clearly identified candidate for federal office." According to *Buckley*, "[t]his construction would restrict the [statutory prohibition] to communications containing *express words of advocacy* of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'

914 F.Supp. at 10-11; Pet. App. at 10 (emphasis added). The above quotation discloses that the district court was thoroughly cognizant of the standard that must be applied. In particular, the district court recognized that this Court's "express advocacy" standard requires "explicit" or "express" words of advocacy. As noted above in footnote 1, the *Buckley* Court sets forth the standard in at least eight passages, and in each of them, insists upon "explicit" or "express" words.

Thus, in comparing the language of *Buckley's* "express advocacy" test to the language of 11 C.F.R. § 100.22(b), the court found the latter to be overbroad. 914 F.Supp. at 13; Pet. App. at 16. Not only does the regulation's plain language show it's overbreadth, the

FEC intended such overbreadth. The district court noted that

> [t]he Explanation and Justification issued on July 6, 1995, reveals that the FEC does intend subpart(b) to have just such breadth:
>
> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.

914 F.Supp. at 13; Pet. App. at 15, *quoting* 60 Fed. Reg. 35,295 (1995). Thus, under *Buckley's* standard, the courts below had no choice but to invalidate the regulation because of its overbreadth.[10]

B. The decisions of the courts below implemented this Court's solicitude for the protection of political speech.

The decisions of the courts below were not made in a jurisprudential vacuum; rather, they specifically implemented this Court's understanding of the policies informing the First Amendment and the consequent solicitude for issue advocacy which is evident in *Buckley* and *MCFL*. As the district court stated, "the Supreme Court has been most concerned not to permit intrusion upon "issue" advocacy – discussion of the issues . . . or of the candidate's positions on . . . issues. . . . " 914 F.Supp. at 12; Pet. App. at 13. Therefore, this Court has drawn a "bright line that may err on the side of permitting things which affect

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[10] It is significant that the two subparts of the FEC's regulation are phrased disjunctively, and therefore, are independent of each other. Therefore, subpart (a) does not have a limiting or narrowing effect on the overbreadth of subpart (b).

the election process, but at all costs avoids restricting in any way, discussion of public issues." 914 F.Supp. at 12; Pet. App. at 13. Indeed, the policy behind the "express advocacy" test dictates that political speech be protected "in order to preserve the discussion of public issues *even at the risk that it is used to elect or defeat a candidate.*" 914 F.Supp. at 12; Pet. App. at 15 (emphasis added). This approach avoids the pitfall of chilling speech because "it permits a writer or speaker to know from the outset exactly what is permitted and what is prohibited." 914 F. Supp. at 12; Pet. App. at 14.

The foregoing quotations from the district court's opinion are entirely consonant with the principles which have been enunciated by this Court. One of the bedrock precepts of *Buckley* is that "[d]iscussion of public issues" is "integral" to our system of government. 424 U.S. at 14. The vice of the disclosure provision in that case was that it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. In order to prevent that evil, this Court allowed impingement of only those expenditures which "expressly advocate a particular election result." *Id.* at 80. The *Buckley* Court drew the line so as to err on the side of protecting speech, for "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45. Finally, this Court's express advocacy test avoids the deterrent effect of vague laws on "those who seek to exercise protected First Amendment rights" by "provid[ing] adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal. . . ." *Id.* at 76, 77.

C. The FEC is incorrect in labeling the decision below a "magic words" test.

The FEC attempts to impugn the decision below by caricaturing it as a "magic words" test. It is no such thing. The courts below did not hold that *Buckley* was limited to the exemplary words in footnote 52 or "their near perfect synonyms" as the FEC contends. Pet. at 12. In fact, the district court noted that Respondents did not object to subpart (a) of the regulation, the part which set forth several examples of express advocacy *which were not found in Buckley*. *MRLC*, 914 F.Supp. at 11; Pet. App. at 10. Thus, the FEC's emphasis on "magic words" is a red herring meant to distract this Court from the proper focus of the case, *i.e.*, the fact that subpart (b) lacks any requirement of "explicit words" of advocacy.

Indeed, the courts below were not called upon to interpret *Buckley*, but merely to say whether the FEC's regulation complied with *Buckley's* test. Therefore, the district court did not give an advisory opinion detailing how *Buckley* might affect a hypothetical regulation of the FEC. Rather, all the courts below were called on to do was to say how *Buckley's* test affected the *actual regulation* under consideration. This was an easy judgment to make because *the FEC's regulation by its terms is lacking in any requirement of "explicit" or "express" words of advocacy.* Subpart (b), which is phrased in the disjunctive and thus stands independently of subpart (a), has no requirement of "express" or "explicit" words. As the district court recognized, the FEC conceded that subpart (b) reached "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments." But such communications are classic "issue advocacy" under *Buckley*; for, as this Court made clear, "debate on the qualifications of candidates" are afforded "the broadest protection" under the First Amendment. 424 U.S. at 14.

D. The courts of appeals have uniformly followed *Buckley's* "express advocacy" test.

As explained above, the courts of appeals have uniformly held that "express advocacy" is a narrow, speech-protective judicial instrument. They have followed both the precise holding and the rationale underlying the "express advocacy" test. *See, e.g.*, cases cited above in footnote 4. The decision below accords with those cases. Furthermore, as the *CAN II* court recognized, even *Furgatch* can be reconciled with those decisions (and, by necessary implication, with the decision below) because its holding was narrow: "the court's analysis focused on the words of the advertisement at issue in the case. . . . " 110 F.3d at 1054. This is further confirmation that the court below correctly applied this Court's precedents.

III. THE DECISION BELOW DOES NOT CREATE A CONFLICT IN THE CIRCUITS.

A. The apparent conflict between holdings of several courts in *dicta* in one circuit court opinion does not constitute a conflict in the circuits.

The FEC is incorrect in claiming that the instant case has created a conflict between circuits. This contention is based solely on the alleged conflict between the First Circuit's decision in the instant case and the Ninth Circuit's opinion in *Furgatch*. But a difference between a holding in one circuit and *dicta* in another circuit does not create a circuit conflict. *Furgatch* was an FEC enforcement action under the disclosure and disclaimer provisions of FECA. The precise issue was whether specific advertisements placed by an individual violated those provisions, the determination of which depended on whether they constituted "express advocacy." The court held that they did. It was in the course of explaining that holding that the *Furgatch* court used in *dicta* much of the language

which the FEC later incorporated into 11 C.F.R. § 100.22(b). Indeed, in its brief in opposition to the petition for certiorari in *Furgatch*, the FEC was careful to distinguish between the holding of *Furgatch* and its reasoning:

> Petitioner makes no other arguments why the result reached in this case was erroneous, Rather, he takes issue with a number of the lower court's general statements regarding law and policy, taken out of their context in a lengthy and discursive opinion.

FEC's *Brief for Respondent in Opposition* in *Furgatch v. FEC;* at 10. As the FEC cogently noted, however, this Court "reviews judgments, not statements in opinions." *Id., quoting FCC v. Pacifica Foundation,* 438 U.S. 726, 734 (1978); Resp. App. at 10. Thus, *Furgatch* does not conflict with the decision below because *Furgatch* does not represent the judgment of a court of appeals that 11 C.F.R. § 100.22(b) is within the statutory authority of the FEC under § 441b and this Court's precedents. *Furgatch* is nothing more than an application of *Buckley's* express advocacy test to specific words in the context of an enforcement action. As the Ninth Circuit noted, however, the precedential value of such cases is limited:

> Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis,* offering limited guidance for subsequent decisions.

807 F.2d at 861.

Indeed, *Furgatch* is posited as the source of a "conflict" only because its *dicta* are the *source* of the regulation at issue here. Although it is evident that, in fashioning its regulation, the FEC employed language which had its origin in *Furgatch,* that is not enough to raise a conflict. There is no conflict precisely because *Furgatch* did not

judge the instant "express advocacy" regulation to be valid. Indeed, the Ninth Circuit has not had occasion to consider the validity of the FEC's express advocacy regulation.[11] Nor has any court of appeals other than the First Circuit reviewed it. Thus there is no circuit conflict; nor can there be a conflict until another court of appeals reviews this regulation and holds that it is within the authority of the FEC under 2 U.S.C. § 441b as construed by this Court in *MCFL*.

In sum, what the FEC has described in its petition is not a "conflict in the circuits," but rather, at most, an apparent conflict between the holdings of several circuit courts and the *dicta* in one circuit court opinion. This does not amount to a conflict in the circuits.

B. The decision below does not conflict with *Furgatch* because *Furgatch* concerned statutory provisions which impose a lighter burden on speech that the provision at issue here.

There is another very significant difference between *Furgatch* and the instant case which precludes any conflict. As noted, *Furgatch* was an FEC enforcement action under §§ 434(c) and 441d, the disclosure and disclaimer provisions of FECA. The instant regulation, on the other hand, was adopted under the purported authority of 2 U.S.C. § 441b which places a blanket prohibition on expenditures by corporations in connection with federal elections. It thus places a far heavier burden on speech than do the disclosure and disclaimer provisions at issue in *Furgatch*. Indeed, this Court has termed § 441b "more

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[11] Moreover, even if the Ninth Circuit were to consider the question of the validity of 11 C.F.R. § 100.22(b), it is by no means certain that it would hold the regulation to be valid since the court would not be bound by its previous *dicta*.

intrusive" than FECA's disclosure provisions. *MCFL*, 479 U.S. at 249. Nor was the difference in the burden lost on the *Furgatch* court. In fact, the Ninth Circuit specifically noted that the burden of disclosure requirements is minimal. Explaining that although "we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act," the court stated that "disclosure provisions" will "have only a 'reasonable and minimally restrictive' effect on the exercise of First Amendment rights." 807 F.2d at 862, *quoting Buckley*, 424 U.S. at 82.

In defining "express advocacy," then, the *Furgatch* court was careful to limit the applicability of the definition to the precise provision which it was construing. It was only because that statutory provision placed lighter burdens on speech, that the court was willing to fashion, in *dicta*, such a broad definition. Therefore, even if *Furgatch* could legitimately be read as expanding the scope of "express advocacy," that case nevertheless does not conflict with the decision below because its broader definition of that term is limited to less burdensome provisions of FECA and those provisions were not at issue below.

For these reasons, there is no conflict in the circuits.

CONCLUSION

For the foregoing reasons, this Court should deny the petition in this case.

Dated: June 16, 1997.

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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-108

HARVEY FURGATCH, PETITIONER

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is published at 807 F.2d 857 (9th Cir. 1987). The order of the court of appeals denying a petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 18a) and the order of the district court (Pet. App. 19a-21a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1987, and on April 23, 1987 that court denied Mr. Furgatch's petition for rehearing and suggestion for rehearing *en banc*. The Petition for a *Writ of Certiorari* was

filed on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reprinted in the Appendix to this brief.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-455 ("the Act") requires that all independent "communications expressly advocating the election or defeat of a clearly identified candidate" must "clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3). The Act also requires that anyone making "independent expenditures" (defined in 2 U.S.C. § 431(17) as an expenditure "expressly advocating the election or defeat of a clearly identified candidate") in excess of an aggregate of $250 in a calendar year must file a report with the Commission for public availability. 2 U.S.C. § 434(c).

One week prior to the 1980 general presidential election, Harvey Furgatch placed a full page advertisement in the *New York Times*. Captioned "Don't let him do it," the advertisement accused Jimmy Carter of "degrading the electoral process and lessening the prestige of the office" in a variety of ways. It then warned: "If he succeeds the

country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning. **Don't let him do it.**" (Pet. App. 22a).

Three days before the general election, Harvey Furgatch placed the same advertisement in the *Boston Globe*. Unlike the first advertisement, which stated that it was paid for by Harvey Furgatch and was "[n]ot authorized by any candidate," the second advertisement omitted the disclaimer that it was "not authorized by any candidate." The two advertisements cost Mr. Furgatch a total of approximately $25,000. (Pet. App. 3a).

Upon the foregoing facts, the Commission found probable cause to believe that Mr. Furgatch had violated 2 U.S.C. § 434(c) by failing to report his expenditures for these advertisements, and violated 2 U.S.C. § 441d by failing to include the disclaimer in the *Boston Globe* advertisement. When conciliation efforts proved unsuccessful, the Commission authorized the filing of this civil action pursuant to 2 U.S.C. § 437g(a)(6)(A).

B. The Decision Of The Court Below

Finding that, on the facts presented, "[r]easonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter" (Pet. App. 16a), the court of appeals concluded that "Furgatch was obligated to file the statement and make the disclosures required for any 'independent expenditure' under the

Federal Election Campaign Act" (Pet. App. 17a).[1] Explicitly acknowledging its obligation to "apply sections 434(c) and [441d] consistently with the constitutional requirements set out in *Buckley* [v. *Valeo*, 424 U.S. 1 (1976)]" (Pet. App. 7a), the court of appeals carefully measured the particular facts of this case against this Court's explanation of the "express advocacy" standard. The court observed that the determination in each case of whether a particular communication contains "express advocacy" is primarily a factual one (Pet. App. 9a), and concluded that the English language is too flexible a tool of communication to permit reducing this inquiry to a rigid formula that would be determinative in all cases (Pet. App. 12a-14a). Nevertheless, the court emphasized that the statute was narrowly limited to communications containing language "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. . . . [I]f any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements" (Pet. App. 14a-15a).

The court found that the language of Mr. Furgatch's advertisement left "no doubt that the ad asks the public to vote against Carter" (Pet. App. 15a).

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[1] The district court had dismissed the case, finding that "although it is a very close call, the political advertisements placed by defendant Furgatch do not, as required by 2 U.S.C. §§ 434(c) and 441d(a), constitute 'communications expressly advocating the election or defeat of a clearly identified candidate' " (Pet. App. 19a).

> The words we focus on are "don't let him." They are simply and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act.
>
> . . . .
>
> Reasonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter. This was the only action open to those who would not "let him do it." The reader could not sue President Carter for his indelicate remarks, or arrest him for his transgressions. If Furgatch had been seeking impeachment, or some form of judicial or administrative action against Carter, his plea would have been to a different audience, in a different forum. If Jimmy Carter was degrading his office, as Furgatch claimed, the audience to whom the ad was directed must vote him out of that office. If Jimmy Carter was attempting to buy the election, or to win it by "hid[ing] his own record, or lack of it," as Furgatch suggested, the only way to not let him do it was to give the election to someone else. . . .
>
> . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

(Pet. App. 16a-17a).

Finally, the court summarily rejected Mr. Furgatch's constitutional challenges to the statute on the ground "that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the

Supreme Court in that case was incorporated in the Act in its present form" (Pet. App. 17a).[2]

On April 23, 1987, the panel unanimously rejected Mr. Furgatch's petition for rehearing, and no judge of the Ninth Circuit requested a vote on his suggestion for rehearing *en banc* (Pet. App. 18a). Mr. Furgatch filed the Petition for *Writ of Certiorari* on July 20, 1987.[3]

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[2] Several months after the district court's decision in this case, Mr. Furgatch filed a separate suit seeking, pursuant to 2 U.S.C. § 437h, certification to the *en banc* court of appeals of the same constitutional arguments raised as affirmative defenses in this case. *Furgatch v. FEC*, No. 85-0720-N(M) (S.D. Cal. filed March 6, 1985). A different district court judge dismissed the second case for lack of case or controversy because of the outstanding judgment in this case that Mr. Furgatch's activities were not subject to the statute he was challenging. When the court of appeals reversed the decision in this case, it also vacated the dismissal in the second case which had been based upon that decision. In its order remanding the second case, however, the court noted that in this case it had already upheld the constitutionality of the Act as applied to Mr. Furgatch. Nevertheless, Mr. Furgatch again petitioned the district court to certify his constitutional challenges to the *en banc* court of appeals, and the district court denied that motion during a hearing on April 6, 1987. On April 30, 1987, Mr. Furgatch filed a petition with the *en banc* court of appeals, requesting a writ of mandamus ordering the district court to certify his constitutional challenges to the *en banc* court. *Furgatch v. USDC-CAS*, No. 87-7180 CIVATT (9th Cir. filed April 30, 1987). To date, no action has been taken on Mr. Furgatch's petition, and the Commission has not been requested to respond to it. *See* Fed. R. App. P. 21(b).

[3] Mr. Furgatch did not request a stay of mandate from the court of appeals and during a hearing on July 13, 1987, the district court denied Mr. Furgatch's motion to suspend further proceedings on remand pending resolution of his *certiorari* petition.

ARGUMENT

The decision below raises no significant issues of statutory construction or constitutional law that have not been dealt with by this Court before. This Court upheld the constitutionality of the predecessor of the reporting and disclosure requirements at issue here in *Buckley v. Valeo*, 424 U.S. 1, 80-81 (1976), and just last Term, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616, 623 (1986), the Court reaffirmed that the "express advocacy" standard contained in those provisions satisfies the First Amendment concerns relied upon by Petitioner. The court of appeals' assessment of Mr. Furgatch's advertisement under that standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court, particularly since this Court discussed the proper application of the express advocacy standard only last Term in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, and applied it in a manner consistent with that of the court of appeals in this case.

1. The court of appeals' finding that Mr. Furgatch's advertisements expressly advocated the defeat of Jimmy Carter in the imminent presidential election is amply supported by the record in this case. Indeed, the advertisements discussed nothing other than Jimmy Carter's reelection campaign. They accused Carter of labelling his opponents in the primary and general elections as unpatriotic, of attempting to use federal funds to buy special interest votes, of campaigning in a manner that

"cultivate[s] the fears, not the hopes, of the voting public," and of attempting "to hide his own record, or lack of it." These campaign tactics, the advertisements asserted, were "degrading the electoral process and lessening the prestige of the office." (Pet. App. 22a).

Petitioner asserts (Pet. 15) that mere criticism of how an election campaign is run does not amount to "express advocacy" under the Act. But that argument is inapposite here, for Mr. Furgatch's advertisements did not merely criticize Jimmy Carter's reelection campaign. Instead, they went on to warn that if Carter "succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion," an unmistakable reference to Carter's election to another presidential term. This warning was followed immediately by the explicit exhortation, in bold print three lines high, **"Don't let him do it."** Plainly, the only way a reader could stop Carter from "succeed[ing]" in "burden[ing]" the country with "four more years" of his assertedly inadequate leadership was to defeat Carter in his bid for reelection.[4]

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[4] These facts demonstrate why the decision in *FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM")*, 616 F.2d 45 (2d Cir. 1980) (en banc), does not conflict with the decision here, as alleged by Petitioner (Pet. 16-17). The leaflet at issue in *CLITRIM* advocated lower taxes and listed a local congressman's votes on a certain tax bill, but it contained "no reference anywhere . . . to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambro." 616 F.2d at 53. The only exhortation in the leaflet in that case called for communication with the congressman on the issue of taxes, not

Petitioner argues (Pet. 17) that the court of appeals' decision conflicts with "the established rules of English grammar," but neither in his Petition to this Court nor in the court below has he ever specified any such "established rule" that conflicts with the result reached by the court of appeals. Petitioner argues (Pet. 17 n.14) that the advertisements actually called only for exposure of Carter's record. But far from being required by rules of grammar, this argument can only be made by ignoring the advertisement's explicit statement that if Carter "succeeds" in what it asks the reader to stop him from doing, "the country will be burdened with four more years" of Carter's leadership. While Carter's alleged hiding of his record is certainly one of the criticized campaign tactics that the advertisement accuses the reader of permitting Carter to pursue successfully, the cumulative success of all those criticized campaign tactics in obtaining "four more years" of Carter's presidency is what the advertisement exhorts the reader to prevent. This is confirmed by the advertisement's publication only three days before the election, when voting against Carter was the only action left to defeat Carter's reelection bid. As this Court explained in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, "[t]he fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."[5]

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action against him. Far from rejecting the Second Circuit's conclusion that this leaflet did not contain express advocacy of an election result, the court below explicitly agreed that *CLITRIM* involved only "issue-oriented speech" (Pet. App. 17a).

[5] Petitioner argues (Pet. 17-18) that *FEC v. Massachusetts Citizens for Life, Inc.* is inapposite here because that case

Petitioner makes no other arguments why the result reached in this case was erroneous. Rather, he takes issue with a number of the lower court's general statements regarding law and policy, taken out of their context in a lengthy and discursive opinion. It is well settled, however, that "[t]his Court . . . reviews judgments, not statements in opinions." *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), *quoting Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Since, as we have shown, the Ninth Circuit's finding that Mr. Furgatch's advertisements contained express advocacy is entirely consistent with this Court's precedents, Petitioner's disagreements with the Ninth Circuit's general discussion of express advocacy provide no basis for granting plenary review.[6]

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involved whether the supported candidates were clearly identified and "the statute's requirement that a candidate be 'clearly identified' invokes a different standard" than whether advocacy is express. But in *Buckley v. Valeo*, 424 U.S. at 43, this Court equated the two, stating that express advocacy requires "explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' . . . requires . . . an explicit and unambiguous reference to the candidate. . . . "

[6] Many of Petitioner's arguments simply misconstrue the court of appeals' views. For example, Petitioner asserts (Pet. 13) that " 'intent' appears to be the controlling and guiding factor in the opinion of the Court of Appeals," although the court of appeals dismissed this factor with the observation that "our attempts to fathom [Mr. Furgatch's] mental state would distract us unnecessarily from the speech itself" (Pet. App. 13a). Petitioner is also misguided in his attempt (Pet. 9-10) to equate the discussion of express advocacy in this case with the broader "clear advocacy" standard adopted by the court of appeals in *Buckley v. Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975), which was narrowed to express advocacy by this Court on appeal, 424 U.S. at 41-44. Initially, since Petitioner never made this argument

Petitioner's similar disagreements with statements and phrases taken out of context from the briefs filed below by the Commission's appellate attorneys (Pet. 4-5, 7-8, 17-18, 20) provide even less of a basis for granting review. Accordingly, these arguments need not be specifically addressed here.

Petitioner's attack (Pet. 16-19) upon the Commission's motives in bringing this case is completely unsupported by the evidence he cites.[7] The Commission's loss

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below, he is foreclosed from advancing it for the first time in this Court. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982); *EEOC v. FLRA*, 106 S. Ct. 1678, 1681 (1986). In any event, this Court rejected the court of appeals' "clear advocacy" standard in *Buckley* because it would have permitted speech designed only to advance issues associated with a candidate to be construed as promoting the candidate's election, thus putting the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). The court of appeals in this case, by contrast, applied the narrower "express advocacy" standard in a manner that forecloses the possibility of varying inferences by limiting the reach of the statute to communications "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate" (Pet. App. 14a). This restatement of the express advocacy test avoids the pitfalls identified in *Buckley* and *Thomas* by ensuring that a communication plausibly subject to "varied understanding[s]" is excluded from the statute's reach.

[7] As an agency of the federal government, the Commission is entitled to a strong "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See also Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

of two cases[8] involving the express advocacy issue in the early aftermath of *Buckley v. Valeo*, 424 U.S. 1 (1976), hardly demonstrates the sort of concerted agency campaign to broaden the statute described by Petitioner. To the contrary, the Commission accepted both of those decisions without even an appeal, and has successfully endeavored to comply with them since. Indeed, there has been only one other report court case involving this issue in this decade, and this Court resolved the express advocacy issue in that case in the Commission's favor last Term. *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623. Petitioner's allegations provide no reason for this Court to revisit this issue so soon.[9]

2. Petitioner also challenges the constitutionality of the reporting and disclosure provisions he violated on the

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[8] *FEC v. CLITRIM*, 616 F.2d 45 (2d Cir. 1980) (en banc); *FEC v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979).

[9] Petitioner asserts (Pet. 21) that this case discloses "at least four ways to construe [express advocacy]." As this brief demonstrates, the Commission has not disagreed with the court of appeals' application of the statute, and the Commission's briefs below were entirely consistent with the court of appeals' decision. Moreover, until now Petitioner has always insisted that he agreed fully with the district court's decision in this case. That reduces Petitioner's four approaches to two. But even the district court and the court of appeals were not really very far apart in their views of this case: both courts agreed that Mr. Furgatch's advertisements were so near the limit of the statute's coverage that the case was a "very close call" (Pet. App. 8a, *agreeing with* Pet. App. 19a). Thus, the "confusion of views among the professionals of the bench and bar" described by Petitioner (Pet. 21) is in reality only a narrowly differing assessment of the facts of this case.

basis of the First and Fifth Amendments (Pet. 21-23). Petitioner's First Amendment challenge is frivolous, for this Court upheld the constitutionality of the predecessors of these provisions, as applied to express advocacy, in *Buckley v. Valeo*, 424 U.S. at 80-81, and Congress specifically limited the coverage of the current provisions to express advocacy "to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976).

Petitioner argues that the reporting requirements violate his Fifth amendment right to equal protection because the institutional press is exempted from these provisions by 2 U.S.C. § 431(9)(B)(i).[10] This Court has repeatedly rejected such equal protection arguments, finding that with respect to campaign finance legislation it is appropriate to defer to the "judgment by Congress that . . . entities having differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981). *Accord, FEC v. National Right to Work Committee*, 459 U.S.

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[10] As Petitioner notes (Pet. 7, 23), he is requesting this Court to consider this contention in the first instance, since the court below did not address it beyond observing that this Court had previously upheld the constitutionality of these provisions (Pet. App. 17a). Petitioner's petition for rehearing to that court did not suggest further elaboration on this issue was necessary. *See* Fed. R. App. P. 40(a) ("The petition shall state with particularity the points of law or fact which . . . the court has overlooked. . . . ").

197, 210 (1982).[11] In particular, this Court noted in *Buckley* that special protections for the news media, like section 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127.

The institutional news media covered by section 431(9)(B)(i) are not, in fact, comparable to an individual purchasing an advertisement for political advocacy. Unlike an individual purchasing an advertisement, when a newspaper publishes an editorial the newspaper's financial sponsorship of the editorial is well understood, so that disclosure of the allocable operating costs is less crucial to the statutory goal of disclosing the constituencies of the candidate. *See Buckley v. Valeo*, 424 U.S. at 81. On the other hand, requiring a newspaper to report the portion of its daily operating costs allocable to editorial comments on federal elections would be far more burdensome than requiring an individual to report a discrete payment of an amount certain to purchase an advertisement.

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[11] *See also Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (summarily rejecting, *inter alia*, equal protection challenge to 2 U.S.C. § 431(9)(B)(i) which was set out in *Athens Lumber Co. v. FEC*, 689 F.2d 1006, 1015-16 (11th Cir. 1983), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984).

In any event, to the extent the Act treats Mr. Furgatch differently than the institutional press, the disparity tips decidedly in his favor. Most if not all of the institutional press are corporations which, as the Court noted in *California Medical Ass'n v. FEC*, 453 U.S. at 200-01, are subject to other, more stringent restrictions on their political activities than the reporting requirements of which Mr. Furgatch complains. Indeed, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 625-26, this Court explained at length how the Act's regulation of corporations is much more burdensome than the reporting requirements in 2 U.S.C. § 434. For example, while Mr. Furgatch is free to purchase advertising expressing his political choices in any newspaper in the country, so long as he reports his expenditures, a corporate newspaper is only permitted to run such an editorial in its own newspaper for distribution to its usual purchasers, and is entirely prohibited by 2 U.S.C. § 441b from expending its money to publicize its electoral views elsewhere. *See FEC v. Massachusets Citizens for Life, Inc.*, 107 S. Ct. at 624.[12] Thus, as in *California Medical Ass'n v. FEC*, 453 U.S. at 200 (emphasis in original), Petitioner's "claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions."

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[12] "[T]he First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed. . . . " *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985).

CONCLUSION

The petition for a *writ of certiorari* should be denied.

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1818

FEDERAL ELECTION COMMISSION, PETITIONER

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our petition for a writ of certiorari, we explain that the courts of appeals are divided on an important issue of federal law—the proper scope of the "express advocacy" test first articulated by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The First Circuit concluded in this case that a Federal Election Commission regulation that concededly tracks the Ninth Circuit's analysis of "express advocacy" is invalid on its face. Respondents briefly deny that the courts of appeals are in fact divided on the question presented (Br. in Opp. 26-29), but they devote the bulk of their

submission to the proposition that the Commission wrongly has disregarded the teaching of *Buckley* and its progeny. Br. in Opp. 4-18, 21-24. Respondents are wrong to contend that there is no division of authority on the question presented, and their disagreement with the merits of the Commission's view is not a basis for precluding this Court's review.

1. As the district court noted in this case, the advertisements at issue in *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), "used none of *Buckley*'s prohibited words" (Pet App. 10a) but nonetheless were found to be "express advocacy" within *Buckley*'s purview. And the district court found it "obvious" that subsection (b) of the Commission's regulation (see 11 C.F.R. 100.22(b)) "comes directly from" the Ninth Circuit's analysis in *Furgatch*. Pet. App. 11a. The district court also emphasized that subsection (b) "appears to be a very reasonable attempt to deal with the[] vagaries of language." *Id.* at 12a. It was only because the district court agreed with respondents that "*Furgatch* and the resulting regulation go farther than *Buckley* and [its progeny] permit" that the district court was able to strike subsection (b) of the Commission's regulation as requested by respondents. *Id.* at 11a; see also *id.* at 15a (noting that *Furgatch* is "[d]irectly contrary to the First Circuit['s]" caselaw interpreting *Buckley* and its progeny). Because the First Circuit summarily affirmed the district court's decision invalidating subsection (b), the First Circuit clearly placed itself in conflict with the Ninth Circuit's understanding of "express advocacy."[1]

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[1] In the courts below, while making other arguments aimed at casting doubt on the persuasiveness of *Furgatch*'s analysis,

Indeed, respondents have not seriously attempted to demonstrate *how* the Ninth Circuit could agree with the First Circuit in this case while *Furgatch* remains on the books. The Ninth Circuit recognized in *Furgatch* that the advertisements there at issue "fail[ed] to state expressly the precise action called for" (807 F.2d at 865), but nonetheless concluded, consistent with the Commission's regulation, that consideration of all surrounding facts and circumstances would lead a reasonable observer only to the conclusion that the ads called for the defeat of President Carter in the 1980 election. Thus, while respondents in conclusory terms repeatedly dismiss the reasoning of *Furgatch* as "dicta" (*e.g.*, Br. in Opp. 15, 16-17, 26-27), they do not, and cannot, offer any cogent analysis of how the result in *Furgatch* can be squared with the restrictive interpretation of "express advocacy" that they successfully urged upon the courts below. In fact, as the district court noted, the ads at issue in "*Furgatch* * * * [are] precisely the type of communication" that the First Circuit's and respondents' interpretation of the law "would permit." Pet. App. 14a.[2]

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respondents in fact faulted the Commission for "promulgat-[ing] a[n] overbroad and vague regulation which adopts the 'minority' judicial position * * * and * * * giv[es] it the force of law throughout the United States." Pls.' Reply Memorandum to Def. Federal Election Commission's Memorandum of Points and Authorities 17; see also C.A. Brief for Appellees 46 ("*Furgatch* is alone, among the cases interpreting express advocacy, in failing to give that term a narrow, speech-protective construction").

[2] Even if respondents could articulate a theory of how the result in *Furgatch* can be squared with the law in the First Circuit, that would at most establish that the Ninth Circuit *could* have reached its result in some other way, *not* that the reasoning that the Ninth Circuit actually employed is "dicta."

Respondents also suggest (Br. in Opp. 28-29) that the decision below does not conflict with *Furgatch*, because *Furgatch* involved Sections 434(c) and 441d of FECA (2 U.S.C. 431 *et seq.*), whereas the decision below involves Section 441b of that statute. While those three sections address different issues raised by campaigns for federal public office, the "express advocacy" test is common to all three, and there is accordingly no sound reason why the meaning of "express advocacy" should change depending on which section is at issue. Compare *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (noting "basic canon" that a phrase used in various sections of the same statute "should bear the same meaning"). To the contrary, when this Court first held that the "express advocacy" test applies under Section 441b, it merely adopted the same test that *Buckley* had already crafted under the disclosure provisions that are now codified in Section 434(c). See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*). Similarly, in adopting the regulation at issue in this case, the Commission expressly rejected the notion that the meaning of "express advocacy" should change depending on which provision of FECA is at issue. See 60 Fed. Reg. 35,294.

2. Respondents also suggest that the Commission is somehow estopped from seeking review in this case, because ten years ago it opposed certiorari in *Furgatch*. Respondents quote several passages from the

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Compare *CFTC* v. *Dunn*, 58 F.3d 50 (2d Cir. 1995) ("a later panel [of a court of appeals] may not disregard the reasoning of a decision because an entirely different line of reasoning was available"; if that reasoning creates a conflict in the circuits, "[t]his conflict is for the Supreme Court, not us, to resolve"), rev'd on other grounds, 117 S. Ct. 913 (1997).

Commission's Brief in Opposition in *Furgatch* that respondents appear to view as inconsistent with the Commission's position in this case. See Br. in Opp. 17, 27. Those statements, however, are simply to the effect that *Furgatch* correctly understood the legal contours of the "express advocacy" requirement, and that this Court does not ordinarily sit to review whether specific facts meet a settled legal standard. The Commission continues to believe that *Furgatch* correctly understood and applied *Buckley*'s "express advocacy" test—as is demonstrated by the Commission's promulgation and defense of the regulation here at issue. Moreover, respondents brought this case as a facial challenge to 11 C.F.R. 100.22(b), and the judgment in their favor therefore necessarily reflects the First Circuit's view that there is *no conceivable set of circumstances* (including, presumably, those at issue in *Furgatch*) to which that regulation may validly be applied. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 300-301 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991). A holding of that breadth can scarcely be labeled "factbound" and accordingly the Commission's reliance on the factbound nature of the claim that was before this Court in *Furgatch* is in no way inconsistent with the petition in this case.

3. As we have shown in the petition (Pet. 12-15), the better reading of this Court's decisions in *Buckley* and *MCFL* is that the "express advocacy" test focuses on whether the electoral message is unambiguous, not on whether that message uses a word drawn from a list of "explicit" directives. Our petition is not answered by respondents' effort to set forth at length those passages from *Buckley* and *MCFL* that they believe support their more restrictive interpretation of "express advocacy." See, *e.g.*,

Br. in Opp. 6 & n.1, 11-12. Respondents' catalogue of quotations establishes only that respondents' restrictive interpretation is a conceivable reading of this Court's cases—a proposition that we have never disputed. Those quotations therefore may explain why the courts of appeals are divided. They do not provide a persuasive basis for this Court to forgo resolution of that disagreement on an important question of federal law.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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